## United States Court of Appeals for the Second Circuit



**APPENDIX** 

### 76-1051

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

STANLEY SIMPSON, JOHN OLIVER BRYANT, and EARL BEST,

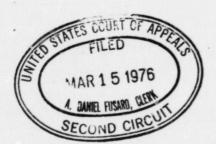
Defendants-Appellants.



Docket No. 76-1051 Docket No. 76-1052 Docket No. 76-1053

JOINT APPENDIX TO THE BRIEFS FOR APPELLANTS

ON APPEALS FROM JUDGMENTS
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ., THE LEGAL AID SOCIETY, Attorney for Appellant SIMPSON FEDERAL DEFENDER SERVICES UNIT 509 United States Court House Foley Square New York, New York 10007 (212) 732-2971

DANIEL MURPHY II, ESQ., Attorney for Appellant BRYANT 233 Broadway New York, New York 10007 (212) 964-7702

VICTOR J. HERWITZ, ESQ., Attorney for Appellant BEST 22 East Fortieth Street New York, New York 10016 (212) 532-9470

### CRIMINAL DOCKET UNITED STATES DISTRICT COURT

JUDGE COOPER 75 CRIM. 436

D. C. Form No.			:			/
	THE UNITED STATES			For 77 9 .	ATTORNEYS	/
	THE ON	vs.		For U. S.:	/	T AUCA
	Y SIMPSON LIVER BRYANT EST	V3.		John P. F1 791-19	)19	1-AUSA
•				For Defendant Elliot A. Ta 335 B'way.N. Allen S. Sti 29 B'way.N.Y Morton J. Tu 60E.42nd St.	ikeff (Bes Y.C.10013 m (Bryant C.10006 irchin (Si	BE 3-3333 () 9-2-1889
(01) STAT	TISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 maile	ed	Clerk				
J.S. 3 maile	ed 1,2,3	Marshal				
Violation		Docket fee				
Title						
18;2113(a	nsp. to rob ins  ) Robbery of in	bank.(Ct.1) bank.(Ct.2)				
	Counts)		POCERDING			
5-2-75	Filed indictme		ROCEEDINGS			•
5-8-75	Deft. STANLEY Deft. JOHN OIT All defendants Magistrate a	SIMPSON present, VER BRYANT present plead not guilt at \$10,000 for each lieu of bail. We to Cooper, J. for	Atty, Mortont, Atty, Aly, 10 days ch defts, beyatt, J.	on Turchin p llen Stim pr for motions. continued.	resent. esent. Bail fi	xed by
5-9-75	JOHN OLIVER BRYANT-Filed deft's. affidavit & notice of motion for suppression of evidence, ret. 5-20-75.					
5-12-75	EARL BEST-Filed	EARL BEST-Filed notice of appearance of Elliot A. Taikeff as attorney for deft.				
5-12-75	JOHN OLIVER BRYAN	JOHN OLIVER BRYANT-Filed notice of appearance of Allen S.Stim as attorney for deft.				
5-12-75	STANLEY SIMPSON-I	Filed notice of appear	arance of Mort	on J.Turchin a	s attorney	for deft
	1	-ov	or-			

-over-

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DATE.	PROCEEDINGS
6-25-75	EARL BEST-Filed affidavit and notice of motion of Elliot A. Taikeff to be relieved as counsel for deft.
7-2-75	Filed OPINION #42716 - Deft's. motion to suppress evidence is in all respects deniedCooper, J. (mailed notice)
7-2-75	STANLEY SIMPSON-Filed deft's. affidavit & notice of motion for suppression of evidence, ret. 5-20-75.
7-2-75	Filed Govt's. memorandum of law in opposition to defts'. motions to suppress.
-75	EARL BEST-Filed deft's. affidavit & notice of motion for suppression of evidence,
7-10-75	EARL BEST AND ELLIOTT A. TATKEFF, John Oliver Bryant: Filed memo endorsed on motion filed 7-10-75: P for permission to withdraw as counsel is granted, and V.J. H URWITZ, PR PUTZEL, AND THE LEGAL AID SOCIETY IS appointed to defend the deits named, Cooper, J. MAN
7=10=75	Filed Affidavit & Notice of Motion by Morton JT Turchin, for an order permitting him to withdraw as counsel for Stanley Simpson, rtble beofre Cooper, J. on 6-26-75.
7-23-75	EARL BEST-Filed CJA Form 20 Copy 2 approving payment to Elliot Taikeff, dated 7-10-75.
7-23-75	JOHN OLIVER BRYANT-Filed CJA Form 20 Copy 2 approving payment to Allen Stim, dated 7-10-75Cooper,J.
7-23-75	Filed Govt's. notice of readiness for trial on or after 7-22-75.
8-19-75	All defts. A.U.S.A. & all counsel present. Trial dated 9-2-75 set Cooper,J.
	Jury duly empaneled & sworn. Trial begun.
	Trial continued.
	Trial continued.
9-5-75	Trial continued. Govt. Rests.
9-9-75	Trial continued.  Trial continued & concluded. Jury Verdict: Best - Guilty cts. 1 & 2
3-3-13	Bryant - Guilty cts. 1 & 2
	Simpson - Not Guilty ct.1, Guilty Ct. 2.
	Remand all defts. without bail. Sentences 10-9-75 at 10 A.MCooper, J.
4	COMMENT OF COMMENT AND A STREET OF THE STREET AND ASSESSED TO A STREET
10-50-75	STANLEY SIMPSON-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed as a Youthful Offender to the custody of the Attorney General or his authorized representative for observation and study at an appropriate classification
	center or agency, within SIXTY (60 DAYS from the date of this order, or such additional period as the Court may grant, pursuant to 18 U.S.C. Sec. 5010(e).
	Issued commitment 10-10-75.
	Cont'd. on Page #3
	·

committed to the custody of the Attorney General or his authorized representative for imprisonment pursuant to Section 4208(b) of Title 18, U.S. Code, for study, report and recommendations as described in Section 4208(c). This commitment is deemed to be for the maximum sentence of THENTY-FIVE (25) YEARS and a FINE of \$15,000.00 prescribed by law, unless altered pursuant to said section upon receipt of the report and recommendations. The results of such study, together with any recommendations which the director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the Court within THERE (3) MONTHS		
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### Page #4

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	Issued commitment 1-21-76	
01-13-76	EARL BEST-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committee	
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	the deft. shall become eligible for parole at such time as the Board of Parole	1
	may determineCooper.J.	
	Issued commitment 1-21-76.	
01-21-76	JOHN OLIVER BRYANT-Filed deft's, notice of appeal from the judgment entered on	
	1-13-76. Mailed notice to John O. Bryant, M.C.C. 150 Park Row, N.Y.C. 10007	
	and U.S. Attorney's Office.	
01 16 76	COLUMN CAMPON DALLA LA CALLA C	
01-16-76	STANLEY SIMPSON-Filed deft's, notice of appeal from the judgment entered on	
	1-13-76. Mailed notice to Stanley Simpson, c/o Federal Defender Services Unit,	
	U.S. Courthouse, Room 509 and U.S. Attorney's Office.	
01-30-76	JOHN OLIVER BRYANT-Filed deft's, affirmation & notice of motion to stay transfer	
01-30-70	from the M.C.C. until 4-6-76.	
	Troit the 11,0,0, ditti 4-0-70,	
01-30-76	JOHN OLIVER BRYANT-Filed Govt's, affidavit in opposition to deft's, motion for a	
	stay of transfer.	
01-30-76	JOHN OLIVER BRYANT-Filed MEMO ENDORSED on deft's, motion for a stay of transfer.	
	Motion denied in all respectsCooper, J. (mailed notice)	
01-30-76	EARL BEST-Filed Deft's. notice of appeal from the judgment of conviction entered	
	on 1-13-76. Mailed notice to Earl Best, M.C.C., 150 Park Row, N.Y.C. 10007	
	and U.S. Attorney's Office.	
02-03-76	JOHN OLIVER BRYANT-Filed notice of certification & transmittal of the record on	
	appeal to the U.S.C.A.	
1/20/20	70. 6	
1/29/16	siled transcript theta 8/19/15	
02-05-76	Filed notice of cortification & transmittal of the record on appeal	
	to the U.S.C.A.	
	EARL BEST-	-
02-05-76	Filed commitment & entered return. Deft. delivered to Warden, M.C.	-
	N.Y.C. on 1-13-76.	
02-05-76	JOHN OLIVER BRYANT-Filed commitment & entered return. Deft. deliver	ed
	tp Warden, M.C.C., N.Y.C. on 1-13-76.	-
02-05-76	STANLEY SIMPSON-Filed commitment & entered return. Deft. delivered	-
	to Warden, M.C.C., N.Y.C. on 1-13-76.	
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DATE	PROCEEDINGS
2-10-76	STANLEY SIMPSON, ET AL Filed Notice of Supplemental Record to the U.S.C.A.
2-5-76	Filed transcript of record of proceedings, dated: Aut 19-75
2-5-76	Piled transcript of record of proceedings, dated : JAN 13-76
2-10-16	Filed transcript of record of proceedings, dated : Sept 2-4-75
2-10-76	Filed transcript of record of proceedings, dated Sept 5, 8-9-75
3-3-76	EARL BEST - Filed true copy of J & C with Marshals return-Dft, delivered on 1-13-76 two
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75 CMM. 436

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA.

STANLEY SIMPSON. JOHN OLIVER BRYANT, and EARL BEST,

Defendants.

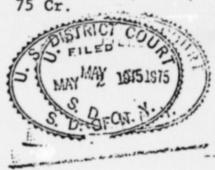
### COUNT ONE

The Grand Jury charges:

- 1. From in and around March, 1975, up to and including the date of the filing of this indictment, in the Southern District of New York, the defendants, STANLEY SIMPSON, JOHN OLIVER BRYANT and EARL BEST, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with other persons to the Grand Jury unknown, to commit offenses against the United States, to wit, to violate Title 18, United States Code, Section 2113(a).
- It was part of said conspiracy that, the defendants, STANLEY SIMPSON, JOHN OLIVER BRYANT and EARL BEST would unlawfully, wilfully and knowingly, by force and violence and by intimidation take and attempt to take from the person and presence of another, property and money belonging to and in the care, custody, control, management and possession of banks, the deposits of which banks were then insured by the Federal Deposit Insurance Corporation.

INDICTMENT

75 Cr.



### OVERT ACTS

In furtherance of said conspiracy and to effect the objectives thereof, the following overt acts, among others, were committed by the defendant in the Southern District of New York:

- On or about the 24th day of April, 1975, the defendant, STANLEY SIMPSON, parked a 1972 Bronze Pontiac in the vicinity of 20th Street and Fifth Avenue, New York, New York.
- 2. On or about the 24th day of April, 1975, the defendants, JOHN OLIVER BRYANT and EARL BEST, went to the Chemical Bank, 156 Fifth Avenue, New York, New York.
- 3. On or about the 24th day of April, 1975, the defendant, JOHN OLIVER BRYANT, entered the Chemical Bank, 156 Fifth Avenue, New York, New York.
- 4. On or about the 24th day of AD. 1 375, the defendants, JOHN OLIVER BRYANT and EARL BEST, went to the Chase Manhattan Bank, 200 Fifth Avenue, New York, New York.
- 5. On or about the 24th day of April, 1975, the defendant, STANLEY SIMPSON, parked a 1972 Bronze Pontiac on Fast 19th Street, New York, New York.
- 6. On or about the 24th day of April, 1975, the defendants, JOHN OLIVER BRYANT and EARL BEST, went to the Manufacturer's Hanover Trust Company (hereinafter "Manufacturer's Hanover"), 130 Fifth Avenue, New York, New York.
- 7. On or about the 24th day of April, 1975, the defendants, JOHN OLIVER BRYANT and EARL BEST, entered the Manufacturer's Hanover.
- 8. On or about the 24th day of April, 1975, the defendant, EARL BEST, waited on line at a teller station in Manufacturer's Hanover.

9. On or about the 24th day of April, 1975, the defendant, JOHN OLIVER BRYANT, had a conversation with a bank guard in Manufacturer's Hanover.

(Title 18, United States Code, Section 371.)

### COUNT TWO

The Grand Jury further charges:

On or about the 24th day of April, 1975, in the Southern District of New York, STANLEY SIMPSON, JOHN OLIVER BRYANT and EARL BEST, the defendants, unlawfully, wilfully and knowingly did enter the Manufacturer's Hanover Trust Company, 130 Fifth Avenue, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation with the intent to commit in such bank, a felony, affecting such bank, namely, to take, by intimidation, money belonging to, in the care, custody, control, management, and possession of said bank.

(Title 18, United States Code, Sections 2113(a) and 2.)

TIGLA J. Kornay

PAUL J. CURRAN United States Attorney

Amited States Bistrict Court SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

STANLEY SIMPSON, JOHN OLIVER BRYANT, and EARL BEST,

Defendants

# NDICIMENT

75 cr.

PAUL J. CURRAN

United States Attorney. A TRUE BILL

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### AFTERNOON SESSION

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2:17 p.m.

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(Jury in box.)

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CHARGE OF THE COURT

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COOPER J: Madam Forelady and ladies and gentlemen of the jury:

I would be sadly remiss if I failed at the very

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outset of this charge by the Court to the jury to express

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to each one of you -- and I am sure each of the attorneys on both sides will join with me -- the deep and keen satis-

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faction that you have brought to all of us by the rapt atten-

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tion, the deep concern, the showing of caring, with respect

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to what has gone on since you took your oath. You have given

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this case your individed attention and you have demonstrated

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that throughout the entire trial.

It is evident that so far you have discharged your duty with fidelity. You have followed the testimony with

20 absorbing interest and intelligent understanding. I am quite

21 satisfied that no single matter relating to the issues has

22 escaped your attention.

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You have been silent throughout and when your turn

comes to speak I have every confidence, and I am sure counsel

on both sides join me in this, that in accordance with the

solemnity of your oath and the high order of your conscience you will pronouce the justice due in this case.

Your selection was the result of great care exercised by the Court and counsel. Your mission is not easy. We are sure you did not expect it to be. A distinguished philosopher, Albert Camus, a Nobel Prize winner, summed it up all for us, for you, for the judge, for counsel, when he wrote: Justice dies from the moment it becomes a comfort, when it ceases to be a burning reality, a demand upon one's self.

We are indebted to counsel, Mr. Vizcarrondo for the government, and Messrs. Herwitz, Concannon, Murphy, and Gipson for the defense, for their genuine concern with the interests of their clients.

have interposed from time-to-time. Please understand that counsel not only have the right but it is indeed their duty on the offer of certain evidence to press whatever legal objections there may be to its admission. They are supposed to spring to their feet, as they did, whenever they think there is reason for them to do so. That's their obligation. So you will draw no inference whatsoever from their participation in this case or the manner in which it was reflected. I hold them in high regard. They deserve the praise of the Court

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for their zeal and for their deep concern. But you are not here to pass on the attorneys, whether you like this one or you don't like that one, or whether you like or don't like the judge. What has that got to do with what I emphasized and reemphasized for two hours while you were being selected? Your only concern is with the evidence and with the law relating thereto.

known as the plaintiff in this proceeding, and each of the three defendants. This is not a contest in salesmanship.

This is not a battle of wits. This is not a clash of personalities. It is by law pronounced to be a conscientious search for the truth, and if you can leave this courtroom with the firm conviction that your verdict is consistent with the truth, then indeed your duty will have been done because the only triumph in any litigated case, whether it be civil or criminal, is the triumph of the truth.

As I told you when you were being selected, every defendant, regardless of his race, creed, color, age, regardless of impediments of any kind, is entitled to a fair trial under our law, and the very same legal propositions of law must be charged by the Court to the jury regardless of the defendant involved. Whether the defendant is successful or waiting for success, whether he is ignorant or well-informed,

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crude or polished, highly estamed or despised, whether he is a member of a good or bad family, yes, even the avowed enemy of our society, each is entitled to his day in court and let justice be done according to the facts and according to the law of the case. That's what America stands for.

The fact that this case took only a few days to try instead of a few weeks has absolutely nothing to do with the quality of justice that the law demands. Thus it is that the Court's charge here is word-for-word what the law requires if the trial had lasted several weeks and if the trial had involved defendants of international repute.

You do not sit here and barons of old who assembled and by whim, favor, or caprice, by likes or dislikes, decided who was going to be flung into jail and who went free and who got the bag of gold, or who was compelled to resign in abject poverty. You have no such power, any more than I have. Your duty is to be the judges of the facts and apply the law to the facts no matter who likes it or who doesn't like it, and let the chips fall where they may. You are here to determine the guilt or innocence of each of these defendants separately.

Neither you nor I are here to please or favor anyone. We have a sworn duty to do, and perform it we must if justice is to prevail. After all, it is your justice, your courthouse, for black, for white, for poor, for rich. It is

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your burden as much as my burden, and you have got to get exercised about the doing of justice as much as I.

We have reached the point where you are soon to undertake your final function as jurors, and here you perform one of the most sacred obligations and responsibilities of citizenship. You are -- make no mistake about it -- the ministers of justice -- said the United States Supreme Court. How solid an appellation is that. Just look at your power. I told it to you backwards and forwards preparatory to your being sworn, while you were being examined as to your capacity to understand what this involves, the burden on you, the sacrifice, the torment, the anguish, and the deep concern that must not leave you for a moment. That's your obligation, and that's the reason you are the ministers of justice. You are not just to be onlookers; you are participants, sworn participants, in the doing of justice.

You are to approach your duties in an attitude of complete fairness, complete impartiality, and to appraise the evidence calmly, deliberately, and as was emphasized by me when you were being selected, without the slightest trace of sympathy, bias, or prejudice for or against the government or for or against each defendant, who are the only parties to this controversy.

We say with great pride -- and we mean it -- that

 all parties, the government, and individuals alike, stand
equal before the bar of justice. Your final role is to
decide the fact issues that are in this case. You and only
you -- not the judge, not counsel -- are exclusive judges of
the facts. You, and only you, pass upon the weight of the
evidence. You, and no one but you, determine the believability
or the credibility of each witness. You, and no one but the
jury, resolve such conflicts as there may be in the testimony
of witnesses. And you and only you, the fury, draw such
reasonable inferences as may be warranted by the evidence.

This may surprise you, but as a trial judge in a federal court I have a perfect right, under the law -- unlike that in the state court -- to comment on the evidence. I could give you, if I wish, my estimate of every witness that took the stand and my impression of each piece of testimony, so long as I remind you that you are not bound by my assessment or by my estimate. You see, a federal court trial judge need not resort to the indications by one way or another how he feels about the facts. He can comment openly, directly, distinctly, pointing out, however, that you, and you alone, are the judges of the facts.

I shall do no such thing. I never have. I don't believe that I should praise you, do you honor, speak of you as the ministers of justice and then invade the orbit of your

function. To me that is like talking out of both sides of one's mouth. That is your responsibility and you are going to have to meet it. I have no doubt that you will meet it.

example in order to make clear a proposition of law. How then am I going to deal in my conscience that you understand what I am charging you as to the law? Facts, you deal with them throughout your whole life. Knowing the law and understanding the law requires extra patience and concentration so you can get the propositions of law, and I may find it necessary to resort to examples in order to bring home the point of the law involved, but that has nothing at all to do with the evidence in this case. You apply the propsitions of law, as I try desperately to make you understand them, to the evidence in this case.

Since I have the power to talk about the evidence and even to give you my evaluation of it, I forbid you from reading into the tone of my voice or the emphasis that I may apply here or there to a proposition of law how the judge feels about the facts. If I wanted to tell you, I would tell you outright, since I have a perfect right to do it.

Why don't I? Really, I don't because I am terribly afraid that as I talk about a piece of evidence in the case you may gather from the way I present it to you -- whether

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you are right or wrong is besides the point -- how I feel about that piece of evidence. Since I don't want as much as by a shadow to indicate what I think as to the facts I avoid commenting on the evidence.

My function is to instruct you as to the law, and it is your sworn duty to accept the law as I state it to you in these instructions and apply it to the facts as you, the jury, find them.

Your oath compels you to apply the law regardless of your personal opinion as to the wisdom or the rightness of any part of the law. I speak very plainly when I tell you that your oath compels you to apply the law as layed down in these instructions. It is unthinkable that a jurywould do otherwise, for that would be the same as a lawyer violating his oath, for which he could be disbarred, or a judge violating his oath, for which he could be removed from judicial office.

What I have just said is as important a part of this charge by the Court as any other part. Never forget it for an instant that you, and you alone, are the sole and exclusive judges of the facts.

Its equivalent is found when it comes to law where the judge is the sole and exclusive judge of the law. You heard counsel press various legal points before me and when

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I disagreed you heard me take a definite position. You do likewise as to the facts no matter who it suits.

which I have tried to apply and which I commend to you for consideration, is to be satisfied with the applause of your own conscience. You must never forget that you sit here as American ministers of justice compelled by your oath and conscience to determine the guilt of the defendants, each one of them, before you based exclusively in the total trial record. What is the total trial record?

The total trial record is the sworn testimony, the exhibits, and the stipulations entered into by both sides, and the instructions of the Court -- all that you saw and heard in open court in this case.

With regard to any fact matter, it is your recollection and yours alone that governs. Anything that counsel,
either for the government or for the defense, may have said
with respect to matters in evidence, whether during the trial,
in a question or in an argument or in summation, is not to
be substituted for your own recollection of the evidence.
So anything that I may refer to, if my recollection doesn't
accord with yours, your recollection prevails, your recollection is paramount.

Before we consider the charge against each of

observations, that are in order, certain principles of law that are applicable to every criminal case, and to some of which I referred at the time of your selection as jurors.

Such is human nature, that people apply the terminal principles of law which

have been hammered out by blood and sweat and are a part,

these defendants and what is required to sustain the charges

against the defendants, there are certain preliminaries,

boiler plate to me. I have said them hundreds of times and or each occasion I regard myself privileged to pronounce these sacred propositions of law.

a glorious part of our country's judicial history. They are

one of them is that if the government is a party in a litigated matter, it is entitled to no greater consideration than that accorded to any other party to that litigation and, by the same token, of course, is entitled to no less consideration. There is no civilized country in the world that stands for that proposition, that the mighty United States government when it comes into court in its own land starts at the beginning along with the defendant. The government is not on first, second, or third base. In France you are almost on second base before a word is said.

Another proposition of law: An indictment is merely an accusation. It is a charge. That's all it is.

It is a method by which persons accused by a Grand Jury of crimes are brought into court and their guilt or innocence is determined by a trial jury, such as you are. It is no evidence whatever of guilt of the defendant and you will not give any weight whatsoever to the fact that an indictment has been returned against these defendants.

Each defendant here has pleaded not guilty and the government, under our law, has the burder of proving the guilt of each defendant "beyond a reasonable doubt" -- which I shall define for you shortly, as I shall other terms that I use.

When I say that, that doesn't mean to imply that the government has not done so or that the government has succeeded. I have got to lay down these principles of law firmly and you, the jury, apply those propositions of law to the facts as you find them to be. Remember, I take no position here on the facts.

After all, ladies and gentlemen of the jury, what does the word "instruction" mean? The law says the judge has to instruct the jury. Does it mean to give you some phraseology and some legal terms which fall on your ears for the first time and leave you troubled and uncertain? Not at all. It means teach the jury, somehow convey to the jury the essence, the substance, the directive of each proposition

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of law in the case.

Now this burden cast upon the government under the law to prove a defendant guilty beyond a reasonable doubt never shifts. It does not go from the government to a defendant, as you may have read or believe. Forget all of that. Take what is given to you by the judge as to the law. That burden never shifts. It remains from start to finish with the government.

It is our law that a defendant doesn't have to prove his innocence. On the contrary, the defendant is presumed to be innocent of the accusation contained in the indictment.

As I told you when you were being selected, this presumption of innocence is a protective shield covering the defendant. When I say "the defendant," I mean each defendant. It continues in favor of the defendant throughout the entire trial, and right as I talk to you this very moment our law says that the shield of presumption of innocence surrounds these defendants during the course of the entire trial. It even continues to shield a defendant while you are deliberating. It is removed, this presumption of innocence, this shield around the defendant, only when you, the jurois, find that guilt has been established beyond a reasonable doubt. Then that protective shield has to be pierced, it falls away

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from the defendant, and it no longer protects him.

The presumption of innocence is sufficient to acquit a defendant of the crime charge against him unless it is overcome by evidence that satisfies your mind beyond a reasonable doubt of the defendant's guilt and unless you are so satisfied it is your sworn duty to find the defendant not guilty.

If, on the other hand, you do not have a reasonable doubt as to guilt, it is your sworn duty to find the defendant guilty.

Let us go to this reasonable doubt. What does the law contemplate by that expression? How much evidence does the government have to place before you, a jury, in any criminal case? Must it be evidence beyond any possible doubt? Absolutely no. The words are "reasonable doubt," and they mean that there is a doubt founded in reason, not imaginary but founded in reason, and arising out of the nature of the evidence in the case, or the lack of evidence in the case. It means a doubt which a reasonable person has after carefully weighing all the evidence; it means a doubt that is substantial and not shadowy. Reasonable doubt is a fair doubt, a doubt which appeals to your reason, your judgment, your common sense, your understanding, and arising from the state of the evidence.

B69 2

A defendant is not to be convicted on suspicion, conjecture, or even impressive evidence which does not rise to the dignity of significant persuasiveness.

Reasonable doubt is not caprice, whim, speculation; it is not an excuse to avoid the performance of an unpleasant duty; it is not sympathy for a defendant or a desire to uphold the government. If after a careful and impartial consideration of all the evidence in the case from start to finish you can candidly and honestly say that you are not satisfied with the guilt of the defendant and that you do not have abiding conviction of the defendant's guilt which amounts to a moral certainty, then you have a reasonable doubt and in that circumstance it is your duty to acquit.

On the other hand, if after such a fair and impartial consideration you can candidly and honestly say that you are satisfied of the guilt of the defendant, that you do have an abiding conviction of the defendant's guilt which amounts to a moral certainty, I mean such conviction or certainty as you would be willing to act upon in important and weighty matters in your personal affairs in your own private lives, then you have no reasonable doubt and in that circumstance it is your duty to convict.

One final word on this subject: A reasonable doubt does not mean a positive certainty or beyond all possible

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doubt. This is not a mathematical problem. You are dealing with human beings, with flesh, with bone, with tissue. If that were the rule, that you must be satisfied beyond all possible doubt, few men, however guilty they might be, would be convicted, for it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its very nature is not susceptible of mathematical certainty.

So, in consequence, the test in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.

So bearing these keystones of the law in mind, let us turn to the indictment lodged against these defendants.

Before I read the indictment to you there are a few comments to make with regard to the indictment in general.

The first count of the indictment charges that from in and around March of 1975 up to and including May 2nd, 1975, the date of the filing of the indictment, Stanley Simpson,

John Oliver Bryant, and Earl Best, as well as other persons to the Grand Jury unknown, conspired to violate Title 18,

United States Code, Section 2113(a), the federal bank robbery statute.

The second count, which I shall call the substantive

count, accuses Stanley Simpson, John Oliver Bryant, and Earl Best of entering on April 24, 1975, the Manufacturers Hanover Trust Company, located at 130 Fifth Avenue, New York, New York, with the intent to commit a felony in that bank, specifically, bank robbery. This count also charges that one or more of the named defendants aided and abetted the commission of the crime alleged in that count. I will discuss the aiding and abetting statute with you at another point in these instructions.

Substantive counts, such as Count 2, and the conspiracy count, such as in Count 1, in some respects are governed by different principles of law. Generally speaking, a substantive count charges a violation of the law which condemns specific conduct as illegal; for example, entering a bank with the intent to rob it. That is a crime. To have actually robbed it is another crime. To carry a dangerous weapon is still another crime. There are no end of crimes in connection with robbing a bank. We are concerned only with the charges in this indictment. So that the substantive account, or the second count, is not that they did actually rob it. That's not the statute which we are applying here. We are applying the statute that makes it a crime to enter a bank with intent to rob it.

On the other hand, in a conspiracy count the

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offense charged is an agreement or an understanding of two or more persons to commit a violation of a particular substantive law, in this case the federal law pertaining to bank robbery. People can get around and agree to plan to do 150 different things, each one being a federal violation. And planning to do it it is a conspiracy. Actually doing it, carrying out what they planned to do, is the substantive act. Planning to push dope, send beer across the country without proper tax -- name it -- any act that is conderned by law and made a federal crime, any planning to do that is a separate crime.

I shall develop conspiracy in greater detail.

In a conspiracy charge there is no need to prove a specific violation of the bank robbery law. If defendants have a mutual understanding with regard to committing robbery, plan to commit a robbery, and each is a participant in that agreement, and a step is taken with respect to that understanding, there is your conspiracy, whether or not they actually entered the bank or did anything with regard to the bank. They could have been fifty miles away and still a conspiracy may have been committed. What one person does with respect to offending the law -- reasons the law -- is bad enough, but when more than one person gets together the chances for detection are less, since the skills with which each one.

brings to the understanding is greater than that of one

person; therefore, the law says, you are not going to do it,

and if you get together to plan such a thing you commit a

crime by just getting together and planning it.

Am I getting through? That's all I care about:

Am I making these propositions clear to you? Sometimes a
judge can be inadequate too. He is just a human being.

In short, the conspiracy charge relates to the unlawful agreement or understanding to commit a crime, whereas the substantive count refers to the actual or completed crime.

The essential elements which the government must prove before a conviction may be had are different in the instance of each crime. We shall consider that separately. I shall begin with the conspiracy count and then discuss the substantive count.

We turn now to Count 1, the conspiracy count.

A high school boy of intelligence, a high school girl of intelligence, can understand this. There was a time in my life as an attorney when this kind of charge would have been in scores of pages and there would be separate indictments for each crime. The law has simplified all of that so that the language is simple, and whatever you want to say against the person is within one indictment, not separate indictments, so you have two separate criminal charges in the indictment

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2 before you. I take up the first one, the conspiracy.

The Grand Jury arges:

- 1. From in and around Marcy, 1975, up to and including the date of the filing of this indictment, in the Southern District of New York, the defendants, Stanley Simpson, John Oliver Bryant, and Earl Best, unlawfully, willfully and knowingly did combine, conspire, confederate and agree together with each other and with other persons to the Grand Jury unknown, to commit offenses against the United States, to wit, to violate Title 18, United States Code, Section 2113(a).
- ants, Stanley Simpson, John Oliver Eryant and Earl Best would unlawfully, willfully and knowingly, by force and violence and by intimidation take and attempt to take from the person and presence of another, property and money belonging to and in the care, custody, control, management and possession of banks, the deposits of which banks were then insured by the Federal Deposit Insurance Corporation.

That's it.

Then there are certain overt acts which are listed in the indictment supporting the government's charge that there was a conspiracy. I will come to that later.

What must the government prove on any conspiracy charge whether it is robbing a bank, no matter what the nature

of the scheme or agreement or understanding may be? The government must prove each of these elements beyond a reasonable doubt. It can't prove one beyond all possible doubt and prove another short of beyond a reasonable doubt. It must establish each one of these three elements beyond a reasonable doubt. If it fails to establish any essential element beyond a reasonable doubt you must acquit. If the government succeeds, your verdict is to convict.

What are these three elements?

First I repeat the fact that if I emphasize in order to make the law clear, that does not reflect my position. When I say that the government must prove three elements beyond a reasonable doubt, each one of them, that is not to say the government has not done so or the government has succeeded. That's your job, not mine.

The first element that should be established beyond a reasonable doubt is that some time between approximately March 1st, 1975 and May 2nd, 1975, the dates specified in the indictment, an agreement or understanding existed between any two or more named or unknown conspirators to commit at least one of the crimes alleged in Count 1, to wit, willfully and knowingly, by force, violation and intimidation taking and attempting to take from the person and presence of another, property and money belonging to and in the care, custody,

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control, management and possession of banks, the deposits of which were then insured by the Federal Deposit Insurance Corporation. In short, the government must prove that a conspiracy existed to rob banks.

The second element that must be established beyond a reasonable doubt is that the defendant you are considering knowingly and willfully became a participant in the conspiracy with knowledge of at least one of its criminal purposes.

The third element, and this, likewise, must be established beyond a reasonable doubt: That one of the conspirators -- not necessarily the defendant you are considering -- knowingly committed in the Southern District of New York at least one of the overt acts set forth in the indictment at about the time alleged in furtherance of the conspiracy.

I instruct you that Manhattan is in the Southern District of New York.

Now, let us go to the first element, the conspiracy, that must be proved beyond a reasonable doubt.

What is a conspiracy? The idea of a conspiracy is very simple. It is a combination, agreement or understanding of two or more persons to accomplish criminal purposes. In this case the government contends the purpose of the conspiracy was to violate the law with respect to bank robbery.

This gist of the crime is the unlawful combination or agreement to violate the law, and it does not matter whether or not it succeeded. Conspiracy has sometimes been called a partnership in criminal purposes in which each member became the agent of every other member.

required to show that two or more persons sat around a table and entered into a solemn or formal pact trally or in writing stating that they formed a conspiracy to violate the law.

Indeed, it would be extraordinary if there were ever such a formal document or a specific oral agreement. From its very nature, a conspiracy is almost invariably secret in its origin and execution. Express language or specific words are not required to indicate assent or attachment to a conspiracy.

When persons in fact undertake to enter into a criminal conspiracy, much is left to unexpressed understanding. That old adage "Actions speak louder than word" is applicable here.

Let me give you a rough example. A says to B,

"I want to make some money. I understand you can pick up a

load of dough pushing drugs. There is going to be a parade.

I don't know what day next week, but it will be up Fifth

Avenue. I am going to town and I am going to push drugs."

B says, "What about me?"

A says, "You want in?"

B says, "Yes."

B71 13

There, ladies and gentlemen of the jury, is a meeting of the minds; there, ladies and gentlemen of the jury, is an agreement. That's all you need. You don't need a speech. You have to be convinced that that's what took place and convinced beyond a reasonable doubt. I give you that as a rough example. There you have an agreement in which A and B are participants and willing participants. Each knows that the objective of the conspiracy is to push drugs, which is a federally prohibited act. That understanding takes less than a minute.

That's well enough. There must be some overt act, some step taken.

Suppose B, who is not the originator of the scheme, calls the local police department -- an innocent thing, a phone call, innocent on its face -- and he says, "Hey, is there going to be a parade up on Fifth Avenue next week?" He gets the answer.

when he put that telephone call in it was in connection with the furtherance of the plan. He wanted to find
out what day that parade was going to take place. That, if
believed, would be tantamount to a conspiracy. It is a rough
example, but if it will help you understand the law with
regard to conspiracy, then it is my purpose to make it crystal

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clear.

You must first determine whether or not the proof establishes the existence of a conspiracy as charged in the indictment. In deciding this first element, it is sufficient if two or more persons, in any way, through any contrivance, impliedly or tacitly, come to a common understanding to violate the law.

Again, notice I say these things repeatedly. Why?

Because that's the only way I know of hammering home a thought

and making sure you get it. Someone else may not get it as

fast as you.

Express language or specific words are not required.

as I have already demonstrated, to indicate assent or attachment to a conspiracy. Nor is it required that you will find that all the co-conspirators alleged in the indictment joined in the conspiracy in order to find that a conspiracy existed.

You need only find that the defendant you are considering entered into an unlawful agreement with one or more persons, known or unknown, in order to find that a conspiracy existed.

An appeal has been made to your common sense. You have common sense. Can you imagine a joint venture where each one would be doing the same thing? One does one thing and another does another. The top guy, the captain, do you think he is the errand boy? Are all these tactical moves

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in a conpsiracy? If that errand boy knows what the overall purpose of that conspiracy is and is a willing participant, he is as much responsible in the eyes of the law as the captain. How they would be dealt with is another proposition. The point is that anyone connected with the conspiracy, regardless of his assignment, whether it is important or menial, if he has a knowledge of the conspiracy and is willing to participate in it in order to have it succeed, and there is some step taken in furtherance of the objective of the conspiracy, then you have a conspiracy and each one of the conspirators, even if there are fifty, is responsible for the acts of the co-conspirators in the furtherance of that plan, whether he knew what they were going to do in connection with it or not. That's what we mean when we say that each one is an agent for the other.

The law doesn't want to hear the protest, "I didn't know all the details of what X was going to do in connection with the conspiracy. Yes, I know it, what the general objectives were, but I didn't know he was going to go as far as he did in connection with the carrying on of the plan."

The law says that doesn't absolve you. You are stuck with what he did. In carrying out that conspiracy, when he did it, he did it in furtherance of the conspiracy. He knew all about it and willingly he participated in the

2 conspiracy. You are a part of it.

So you need only find that the defendants you are considering entered into an unlawful agreement with one or more persons known or unknown in order to prove a conspiracy existed.

In determining whether the conspiracy charged in this indictment actually existed, you may consider the evidence of the acts and conduct of the alleged conspirators as a whole and the reasonable inferences to be drawn from such evidence. If, upon such consideration of the evidence, you find beyond a reasonable doubt that the minds of at least two conspirators must in an understanding way and that they agreed, as I have explained, to work in furtherance of the unlawful scheme alleged in Count 1, then proof of the existence of the conspiracy is complete.

I am giving you much better language than I employ, but I hope you will understand that the reason I step in with examples is all for the purpose of making you understand.

You understand that, don't you? That's out of me. I don't have to do this. I can read you this (indicating). There is no obligation on my part to break it down. Why do I break it down? Because you are dummies? Of course not. It is because of my respect for your deep concern as to what the law is and the fact that you want to undertand it.

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It's all right to read those highfalutin expressions.

They are glorious to express. But to give them at one time and to expect an understanding of it -- those who have spent years with these propositions still worry about them -- I don't go for it. Understanding upon first reading, I don't go for it.

If you do conclude that a conspiracy as charged did exist, you must next determine the second element: Whether the defendant you are considering was a member. You will determine this from all the proof in the case. You must consider each defendant's alleged participation separately and make a separate determination as to nim. However, in so doing you should consider all the evidence; that is, the acts and statements of the defendant, as well as the acts and statements of the alleged co-conspirators.

Incidentally, unless you find that two conspired, there can be no conviction on the conspiracy count, since it requires at least two to make a conspiracy. Mere association of a defendant with an alleged co-conspirator does not establish his participation in a conspiracy, if you find one did exist.

So too, mere knowledge by a defendant of a conspiracy or the illegal act on the part of another co-conspirator is not sufficient to establish membership. To find a defend1 pgds

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ant guilty of the conspiracy you must be satisfied that he knowingly and willfully joined the conspiracy with the intent and purpose of furthering its object.

The question of intent is one of the facts you must weigh. Clearly this concerns what is in one's mind and the purpose which motivates a person in the course of conduct.

Medical science has not yet devised an instrument to record criminal or willful intent. It is a mental process and attitude. Usually direct proof of it is not available. Intent and motive are determined from the acts, conduct and circumstances and such reasonable inferences which may be drawn therefrom. I shall develop this a little later too.

If you find circumstances of secrecy, intrigue or deviousness or attempt to conceal by false statements or otherwise the real nature of a transaction, you may consider these along with other evidence in the case as showing consciousness of guilt. I shall develop that a little later on.

Before considering the element of overt acts there is another principle in the law of conspiracy which you should bear in mind. When two or more persons knowingly associate themselves together to carry out a common plan or arrangement, with intent either to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means, there arises from the very act of knowingly associating themselves

as I mentioned before, member becomes the agent of every other member. To put it another way: When men enter into an agreement for an unlawful end, they become agents for one another.

So where the evidence in the case shows such a common plan between two or more persons, evidence as to an act done or statement made by one person is admissible against all, provided the act be knowingly done, or the statement be knowingly made, during the continuance of the common plan and in furtherance of some intended object or purpose of the common plan.

In order to establish proof that a defendant or any other person was a party or member of such a common plan, the evidence, direct or circumstantial, must show that the plan was knowingly formed and that the defendant, or other person who is claimed to have been a member, knowingly participated in the plan or arrangement with the intent to advance or further some intended object or purpose of the plan.

In determining whether or not a defendant, or any other person, was a party to or member of such common plan, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant or any other person in such a common plan or arrangement must be satisfied

by evidence as to his own conduct, that is, what he himself knowingly said or did.

If and when it appears from the evidence, direct or circumstantial, in the case that such a common plan or arrangement did exist, and that the defendant was one of the members of the plan, then the acts and statements by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of the common plan or arrangement, and in furtherance of some intended object or purpose of the plan or arrangement.

Otherwise, any admission or statement made or act done by one person outside of court may not be considered as evidence against any person who was not present and did not see the act done or hear the statement made.

An act or statement is knowingly done or made if done or made voluntarily and intentionally and not because of mistake or other innocent reason.

It is not required that all of the co-conspirators know each other. They may not have even associated together previously. Indeed, it may be that a defendant may know only

one other member of the conspiracy, but if he enters into an unlawful agreement with that other member of the conspiracy he becomes a party thereto. The question is: Did the defendant join one or more others in the conspiracy with awareness of at least some of its basic purposes and aims? If so, then the law treats him as a full member of the conspiracy and he becomes liable for the acts of all the other conspirators.

Thus, if you find that a particular defendant is a conspirator, then however limited his role in furthering the objectives of the conspiracy he is responsible for all that was done in furtherance thereof during its continuance.

I will tell you about an overt act and then we will take a recess. Then we will conclude the charge with the law on conspiracy. There are other charges of the Court dealing with other propositions of law. It will take much less time.

I have already mentioned the third essential element of the crime of conspiracy, and that is that the overt act to effect the object of the conspiracy has been committed by at least one of the co-conspirators after the unlawful agreement has been entered into.

What is an overt act? It is akin to the example

I gave you of the telephone call: "When is there going to

be a parade next week?" That's a step to carry out or to

further the object of the plan. An overt act is any step,

action, or conduct which is taken to accomplish or further

the object of the conspiracy.

that's all that has to be proven, one overt act — is that while parties might conspire and agree to violate the law, they may change their mind and do nothing to carry it into effect, in which event that would not constitute an offense. They plan to do this, that, and the other, but they abandon it — the law, which is based upon human behavior, is no fool; the law knows human behavior; it knows what a conspiracy will do. The law also knows that people might abandon a plan so why hold them responsible if they abandon it? But the law has the wisdom to know that if a step is taken, that shows they are carrying it out. So the law says that you have to prove at least one overt act.

The overt act need be neither a criminal act nor the very crime which is the object of the conspiracy. It need not be committed by the particular defendant under consideration.

I will now read the overt acts charged in the conspiracy count of the indictment. It is after the language I read to you that charged the conspiracy.

In furtherance of said conspiracy and to effect

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the objectives thereof, the following overt acts, among others, were committed by the defendants in the Southern District of New York.

- 1. On or about the 24th day of April, 1975, the defendant Stanley Simpson parked a 1972 bronze Pontiac in the vicinity of 20th Street and Fifth Avenue, New York, New York.
- 2. On or about the 24th day of April, 1975, the defendants John Oliver Bryant and Earl Best went to the Chemical Bank, 156 Fifth Avenue, New York, New York.
- 3. On or about the 24th day of April, 1975, the defendant John Oliver Bryant entered the Chemical Bank, 156 Fifth Avenue, New York, New York.
- 4. On or about the 24th day of April, 1975, the defendants John Oliver Bryant and Earl Best went to the Chase Manhattan Bank, 200 Fifth Avenue, New York, New York.
- 5. On or about the 24th day of April, 1975, the defendant Stanley Simpson parked a 1972 bronze Pontiac on East 19th Street, New York, New York.
- 6. On or about the 24th day of April, 1975, the defendants John Oliver Bryant and Earl Best went to the Manufacturers Hanover Trust Company, 130 Fifth Avenue, New York, New York.
  - 7. On or about the 24th day of April, 1975, the

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defendants John Oliver Bryant and Earl Best entered the Manufacturers Hanover.

8. On or about the 24th day of April, 1975, the defendant Earl Best waited on line at a teller station in Manufacturers Hanover.

9. On or about the 24th day of April, 1975, the defendant John Oliver Bryant had a conversation with a bank quard in Manufacturers Hanover.

Those are the overt acts. The government is only required to prove one overt act.

It is not necessary for the government to prove that each member of the conspiracy committed or participated in any particular overt act, since the act of any one done in futherance of the conspiracy becomes the acts of all the other members. Also, the government is not required to prove each of the overt acts. I have said that repeatedly. It is sufficient if it proves the commission of at least one of the acts set forth in the indictment at or about the time alleged. It need not have occurred at the precise time or the precise place as alleged therein.

So, too, while the indictment alleges that the conspiracy began from in and around March 1975 and continued to on or about May 2nd, 1975, it is not essential for the government to prove that the conspiracy started and ended on

cr about those specific dates. It is sufficient if you find
that in fact a conspiracy was formed and existed for some
period of time within the period set forth in the indictment
and at least one of the overt acts was committed during that
period.

The offense of conspiracy is complete when the unlawful agreement is made and any single overt act in furtherance of the conspiracy is committed by at least one of the conspirators. It is not necessary for completion of this crime that the conspirators succeed in carrying out the conspiracy's unlawful purpose -- in this case, the robbing of banks.

Thus, in order to prevail under the conspiracy count, the government must establish by the required degree of proof the existence of the unlawful agreement, that the defendant you are considering knowingly and willfully associated himself with the conspiracy and the commission of at least one overt act in furtherance thereof. If the government succeeds, your verdict should be guilty. And, obviously, if the government fails, your verdict should be not guilty.

Court declares a short recess.

(Recess.)

(Jury in box.)

THE COURT: You don't know what has yet to come but

I will endeavor to make it as clear as I know how.

Off the record.

(Discussion off the record.)

THE COURT: You will recall my telling you that

Count 1 charges a conspiracy to violate a federal law and that
the conspiracy was an agreement to achieve objectives in
violation of this law. I shall now discuss this underlying
law.

Count 1, the conspiracy count, charges that these defendants, Stanley Simpson, John liver Bryant, and Earl Best conspired to violate the federal bank robbery statute. How does that federal statute read? The statute applicable to this case reads as follows:

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank is guilty of a crime.

Further the law says, in defining the term "bank," it includes any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

Let us look at Count 2. Let me read it to you.

On or about the 24th day of April, 1975, in the Southern District of New York, Stanley Simpson, John Oliver

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Bryant and Earl Best, the defendants, unlawfully, willfully and knowingly did enter the Manufacturers Hanover Trust Company, 130 Fifth Avenue, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation with the intent to commit in such bank a felony affecting such bank, namely, to take by intimidation money belonging to, in the care, custody, control, management, and possession of said bank.

Remember, "with the intent to commit in such bank a felony affecting such bank." It does not say with the intent and completion of that attempt by the actual robbery.

What are the elements of this charge, Count 2, the bank robbery? Do you remember I gave you the elements that must be established, each of them, in connection with the conspiracy? What are the elements that must be established beyond a reasonable doubt as to this count, the robbery?

First, that an object of the conspiracy was to rob at least one bank, the deposits of which were insured by the Federal Deposit Insurance Corporation. You do not have to find, however, that a defendant knew the bank was insured by the Federal Deposit Insurance Corporation. That's No.1.

Element No.2, there must be established beyond a reasonable doubt: That an object of the conspiracy was

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to take property or money belonging to or in the care, custody, management or possession of that bank. On this element the government relies in part on evidence that the defendant Best dropped a note demanding money after he was arrested outside the Manufacturers Hanover Trust Company.

The third element that must be established beyond a reasonable doubt: That the property or money was to be taken from the person or presence of another, for example a bank employee.

The fourth element: That the conspirators were to accomplish the taking of property or money by force and violence or by intimidation.

As stated before, the hurden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The first element of the offense is that the bank involved must be a bank the deposits of which were insured by the Federal Deposit Insurance Corporation. You have heard witnesses testify to the effect that each of the banks involved here was a bank the deposits of which were insured on April 24, 1975 by the Federal Deposit Insurance Corporation.

Remember that it is not necessary that a defendant knew that

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the bank was insured. I do not think you will have much difficulty with this, but, it being an element of the crime, you must nevertheless find that it has been established beyond a reasonable doubt.

The second element is also relatively simple, namely that an object of the conspirity was to take property or money belonging to or in the care, custody, management or possession of that bank. As to this element, the government relied in part on evidence that the defendant Best, after he was arrested outside the Manufacturers Hanover Trust Company, dropped a note demanding money. To sustain its burden it is not necessary that the government prove that a defendant succeeded in taking money from the bank; the government need only show that the money was an object of the conspiracy.

Now the third element which must be proven is, as

I mentioned, that the property or money was to be taken from
the person or presence of another. For example, a bank
employee. I do not think that you will have much difficulty
with this element, as it is not contested by any defendant
that no one was in any of the banks on April 24, 1975. Nevertheless you must satisfy yourselves beyond a reasonable doubt
with respect to this and with respect to every element.

Now we come to the fourth element, which is that the taking of money was to have been accomplished by force

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and violence or by intimidation.

With respect to the fourth element, the government is not required to show that force and violence were actually to be used against anyone if it proves beyond a reasonable doubt that the taking was to be the result of intimidation — that is, the result of placing another person or persons in fear. Intimidation may be established by proof of circumstances that are normally and reasonably calculated to arouse fear in the ordinary run of human beings.

So if it happened that some extraordinarily timid person was put in fear by some sort of words or action that would not normally frighten anyone, this would not be the kind of an intimidation with which the statute is concerned.

on the other hand, if the proof shows conduct by a defendant which would normally be expected to generate fear, then it is not necessary that those affected should actually have experienced some terror or panic or hysteria. The question, in this respect, is an objective one: It is whether the government has sustained its burden of showing conduct intended by the conspirators which was of such a nature as to be a sensible and expectable basis for the creation of fear.

So you have to determine from the evidence adduced from the total proof whether or not the actions of the defendant that you are considering induced or precipitated fear.

Fear, of course, you as human beings, mothers of children, fathers, parents, grownups yourselves, you know that fear registers itself depending upon the human being involved. It takes all kinds of forms. For some people there is an immediate fright and there is a fainting away, and with other people there is a fear that some are able to control and not speak out with regard to it, and yet feel an inner horror or fear. You know what we mean by becoming fearful because you have lived. You have seen it in the eyes of your children and in the eyes of adults. And that is the kind of fear we are talking about. It is no special fear.

On this element the government relies in part on the statement in the note it contends was dropped by the defendant Best, "Freeze; keep hands in view; don't try anything or you will die; I have a bomb," as well as the evidence that a dummy hand grenade was found on the defendant Bryant after his arrest.

To find each defendant guilty on the second count you must find the following beyond a reasonable doubt:

First, that on or about April 24, 1975, the

Manufacturers Hanover Trust Company, 130 Fifth Avenue, New

York, New York, was a bank, the deposits of which were insured

by the Federal Deposit Insurance Corporation.

Second, that on or about that date the defendant

2 entered the Manufacturers Hanover Trust Company Branch located
3 at 130 Fifth Avenue, New York, New York.

The government relies in part on the testimony of several witnesses. That is up to you. You have heard the testimony. That is up to you to determine whether or not that particular element has been made out beyond a reasonable doubt.

Third, the defendant entered the bank with intent to commit in it a felony affecting the bank, namely, taking by intimidation from the person or presence of another, money belonging to or in the care, custody, control, management and possession of the bank.

The first two elements are simple and require no further elaboration. The third element does.

The third element is that the defendant entered

the bank with intent to commit a felony affecting the bank,

namely, taking by intimidation from the person or presence

of another money belonging to, or in the care, custody, control,

management, and possession of the bank.

So that on the third element you must decide

whether the government has proved beyond a reasonable doubt

that the defendants Best and Bryant entered the bank intending

to take by intimidation, from the person or presence of another,

money belonging to or in the care, custody, control, manage-

ment, and possession of the bank.

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Ladies and gentlemen, there is another statute over and above those that I have tried to delineate with absolute certainty, and that is what we call the aiding and abetting statute. What is that?

Any person who commits the acts that the section that I have been dealing with declares to be a crime, of course it is a crime. It is also a crime, however, not only to commit the illegal acts to which I have just referred, but to aid or abet or procure or induce another person to commit such acts. That is based on the aiding and abetting statute of the law which reads as follows:

Whoever commits an offense against the United
States or aids, abets, counsels, commands, induces or procures
its commission, is punishable as a principal.

This statute therefore provides that a person who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself. Accordingly, you may find a defendant guilty if you find beyond a reasonable doubt that another person committed the offense charged in that count and that the defendant you are considering aided and abetted that person in effectuating it.

To determine whether a defendant aided and abetted the commission of the offense, you should ask yourselves these

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quistions: Did he associate himself with the venture? Did he participate in it as something he wished to bring about? Did he seek by his actions to make it succeed? If he did, then he is an aider and abouter.

To find a defendant guilty of aiding and abetting, you must find something more than mere knowledge on his part that a crime was being committed, for a mere spectator at a crime is not a participant. But, in order to convict, it is not necessary that you find that a defendant himself did all of the criminal acts since participation in the crime can be found if you find he aided and abetted; in other words, that he assisted another in committing it.

For example, if you should find beyond a reasonable doubt that the defendants Best and Bryant tered the Manufacturers Hanover Trust Company intending take by intimidation from the person or presence of another money belonging to or in the care, custody, control, management and possession of that bank, and if you also find beyond a reasonable doubt from all the evidence that the defendant Simpson knowingly assisted Best and Bryant in their venture by driving what was to be the getaway car, then you must find the defendant Simpson guilty of the crime charged in Count 2.

After all, it is not uncommon that in any combination of persons to achieve a goal, legal or illegal, each

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person has a different, not a duplicating, job to do in going about the attainment of the common purpose.

Some of you may have noticed that there has been no evidence that any of these banks were actually robbed.

I have said that backwards and forwards, but I want to be sure you understand that the government does not have to prove that these defendants did, in fact, rob a bank. They are not charged with bank robbery.

As I have just instructed you, they are charged only with conspiracy to rob a bank and entering a bank with intent to rob. Have you got that? The law proscribes unsuccessful as well as successful criminal activity, so long as all the essential elements of the crime have been proven beyond a reasonable doubt. Here the government does not need to prove actual bank robbery as an essential element of its case, and you do not have to find that any of these defendants robbed a bank in order to convict any or all of them on either or both of the counts in the indictment. However, before you can return a verdict of guilty, every element that does have to be proven as I have explained them to you must be established beyond a reasonable doubt. If you are not convinced by that degree of proof which the law requires then it is your sworn duty to acquit; otherwise it is your sworn duty to convict.

The indictment charges the defendants with having

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unlawfully, willfully and knowingly committed the offense set forth there. Although these words almost define themselves, nevertheless they are set forth in the counts of the indictment so as to make certain that no one would be convicted because of mistake or inadvertence or other innocent reason.

So by the use of these words, unlawfully, willfully and knowingly, the government must prove beyond a reasonable doubt a specific intent to commit a crime before there can be a conviction as to the counts in the indictment. An act or failure to act is done knowingly if done voluntarily and purposely and not because of some mistake or inadvertence, stupidity or carelessness or other innocent reason.

Unlawfully means contrary to law, so to do an act unlawfully means to do willfully something which is contrary to law.

More precisely, what is meant by willfully, in the eyes of the law, means doing an act knowingly and purposely with bad intent. It means having the purpose to cheat or defraud or do a wrong. It means with specific intent to disregard the law or to do that which the law forbids. It involves a conscious wrongdoing.

On the other hand, willfully does not mean inadvertence, carelessness or honest misunderstanding of what the law requires, and so carelessness, thoughtlessness,

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misunderstanding, or the like, is not equivalent to willfulness. Willfulness involves the state of the person's mind and that is an issue of fact as much as the state of his digestion. It is an issue that you are called upon to decide.

A knowledge of law without common sense is a misguided performance and that is the reason why some great
author -- I think it was Robert Louis Stevenson -- said something about books being a bloodless substitute for life.

Your knowledge of life is what makes you such an important arm of justice and why you are called the ministers of justice. It is obviously impossible to ascertain or prove directly what was the operation of the mind of a person, the intent of any defendant. You can't look into a person's mind, but a wise and intelligent consideration of all the facts and all the circumstances shown by the evidence and the exhibits in the case will enable you to infer with a reasonable degree of accuracy what were the defendant's intentions. You must be satisfied on that score beyond a reasonable doubt.

Intent involves a mental attitude and with the knowledge of surrounding circumstances you may draw a definite and logical conclusion with respect to intent. In your everyday affairs you are continuously called upon to decide from the actions of others what their intentions are. Experience has taught us -- and I again say that actions speak more

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clearly than spoken or written words. You see a little jam 2 on Johnny's cheek. You don't need a whole speech to know he 3 has been in the refrigerator and gone to the jam jar.

You must rely in part on circumstantial evidence in determining the guilt or innocence of a defendant. Proof of the circumstances surrounding a man's actions can supply an adequate basis for a finding that a defendant acted knowingly and willfully. The actions of a man must be set in their time and place. Just as the meaning of a word is understood only in its relation to other words in a sentence, so the meaning of a particular act may depend on the circumstances surrounding it.

What about circumstantial evidence? Let me tell you ight now what circumstantial evidence is in the eyes of the law. This is a law speaki. through the judge. It ha: the same weight as direct evidence.

First, let me deal with direct evidence. When I look at you I see you and that is direct evidence. My eyes behold you. When I ask the clerk, "Is the jury here?" at that moment I don't see you. When the clerk says, "Yes, Judge, they are here," that's circumstantial evidence that you are here. It is as good as direct evidence in the eyes of the law.

Take a common example used by judges. It is simple

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evidence. You came in here. It was clear, the sun was shining, and suddenly in comes a human being and he is dripping
wet; he sits down and there is a puddle that his garments and
umbrella create. Well, you didn't see the rain but there is
circumstantial evidence that it has been raining since you
came into the courtroom.

If you saw the rain with your cwn eyes, that would be direct evidence. This other example is circumstantial evidence, equally important if you are convinced of it. Either one is acceptable and recognizable in law. Generally, the proof of it is an objective fact and circumstance from which one in terms of common experience would rationally and logically conclude the ultimate fact. It is rare, indeed, that there is direct evidence and knowledge. Knowledge is generally shown by circumstantial evidence. Direct evidence, then, is testimony as to what a witness saw, heard, or observed, what he knows of his own knowledge.

Circumstantial evidence, on the other hand, rests on an inference. Proof is given of facts and one infers there from what reasonably follows in the common experience of man-kind.

I point out to you that circumstantial evidence if believed is of no less value than direct evidence. There is

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no requirement that proof of a crime and a defendant's guilt be by either or both types of evidence. The only requirement is that such proof is beyond a reasonable doubt.

A few words as to the credibility of witnesses.

It is your estimate of the testimony given by the witnesses, and each of them, that is controlling, not that advanced by the attorneys or suggested by anybody. They have a right to give you their interpretation of the facts; you are the sole judges of the facts and the greatest burden you are going to have is to estimate that testimony given.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony.

In weighing the effect of such a discrepancy, consider whether it pertains to a matter of importance or to an unimportant detail and whether the discrepancy results from innocent error or from willful fair shood.

In sizing witnesses up, in your search for the truth you should be guided by your plain, everyday common sense. You saw each witness, you observed the manner of his giving testimony. Out of the welter of testimony you are called upon to determine the factual issues in the case. Thus, upon all the evidence, you, the jury, are to resolve the conflict.

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The test, always, is: Are you satisfied beyond a reasonable doubt from the entire record, in accordance with the Court's instructions of the guilt beyond a reasonable doubt of the defendant on trial.

If upon a cautious and careful examination you are satisfied that the witnesses have given a trutiful version and the government has sustained its burden of proof beyond a reasonable doubt in all of the respects as outlined in my instructions, then you have sufficient proof on which to bring in a verdict of guilty. Otherwise the defendant is entitled to an acquittal.

Your great strength, I repeat, is in your common experience with humanity. You determine the value of the testimony of each witness.

You should ask yourselves, "How does this testimony," referring to every witness, "impress me?" What degree of credit you should give the witness' testimony should be determined by his conduct, his manner of testifying, his relation to the controversy, his bias or impartiality, and the reasonableness of his statements. Is the witness interested in the outcome of the case? Is there a motive to testify falsely? Was the witness mistaken? Was he correct? In other words, what you try to do, to use the vernacular, is "to size up a person," just as you would in any important matter when

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you are undertaking to determine whether or not a person is truthful, candid and straightfoward.

A witness may be discredited or impeached by contradictory evidence that at some time he has said or done something or failed to do or say anything which is inconsistent with his present testimony. The testimony of any witness whose self-interest is regarded convincing to you is to be considered with great caution and weighed with great care. You should consider the witness' intelligence, motive, state of mind and demeanor while on the stand. You should consider his candor, or lack of candor, his possible bias, his means of information, and the accuracy of his recollection.

If you believe that any witness has been inseached and thus discredited, it is your exclusive province to give that witness' testimony such credibility as you think it deserves. If you find any witness has testified falsely as to any material fact, you may reject all of the testimony of that witness or you may accept such parts or portions which commend themselves to your belief.

Your determination of the credibility of a witness very largely depends upon the impression that he made upon you and the conviction with which he testified as to whether or not he was giving an accurate version.

The fact that a witness is an official or an

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employee of the government does not mean by itself that you should give greater or special credit to his testimony.

The testimony of any such witness should be weighed and scrutinized in the same manner as any other witness who has testified in this case. You judge their testimony in the same way, taking into account interest or any factor which may have influenced them to color or fabricate their testimony.

It is quite apparent to you, as it is to the judge, that no defendant took the stand. I told you about the law relating to that while you were being examined, before you were sworn as jurors. I emphasized it because it is one of the most sacred propositions known to law.

This is a result of a history of violence, of the researching of a human being for a statement which might or might not be true. The rack, the torment you know generally from your schoolbooks, was enforced for centuries. Man's inhumanity to man brought about our founding fathers' concept which insists that no man should be made to say, and the fact that he remains silent doesn't mean a thing against him. So there is a law, and it is a wholesome law, so-to-speak. It is sacred. You would no more think of violating it, I am sure, than the judge himself. That law is that you cannot, must not, under any circumstances hold it against the defendant in a criminal case because he does not take the stand. You cannot

infer anything by reason of that. As I told you before —
and I say it again — every defendant has a right under our
law to say, "You have charged me with something now; I do not
have to participate; I am here to hear what you have to say;
you prove your charge against me and prove it beyond a reason—
able doubt" — and that's exactly what his position is under
our law. He does not have to take the stand; he does not
have to offer any testimony whatsoever, and the jury must not

infer anything against him by reason thereof.

defendant to take the stand is his absolute constitutional right. He is not required to testify. If you as much as have a shadow cross your mind against the defendant because of his failure to testify, because of his failure to take the stand, you yourself would violate your oath. You cannot disregard these instructions or any one of them. And so I repeat to you that a defendant in a criminal case does not have to to testify and the fact that he does not testify or even if he called no witnesses whatsoever cannot be held against him in any respect.

At the time that certain evidence and certain exhibits were admitted, I cautioned you that the evidence or that exhibit was to be considered only as to a particular defendant. I repeat that instruction here and now. Under

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no circumstances are you to allow any of such evidence to enter into your deliberations when you consider a defendant other than the one to whom it relates.

That does not mean that aside from that the total evidence against such other defendant may not convince you of his guilt beyond a reasonable doubt. The point is that each one of these defendants stands on his own footing. The evidence as to each one must be considered separately, and that's the reason why you take all the evidence against each defendant separately, you add it up, and you ask yourselves whether or not the total of the evidence against defendant No.1 convinces you beyond a reasonable doubt whether or not special evidence received is binding on him or not, and then you do the samething with respect to defendant No.2, and then defendant No.3.

Remember, as to each count and as to each defendant the test is whether the total evidence in the total trial record against him and the law applicable thereto establishes his guilt beyond a reasonable doubt.

There has been a lot of talk about the admissions of a defendant. Admissions of a defendant are among the most effectual proofs in the law and constitute the strongest evidence against the party making it that can be given of the facts stated in the admissions. Accordingly, you are

2 entitled to give great weight to a defendant's admissions in this case.

However, admissions or confessions made by a defendant after he was arrested in this case may only be considered by you in determining the guilt of that defendant and may not be considered against the other defendants.

number of statements tending to show his innocence after his arrest. The government contends there has also been testimony that these statements were false. I charge you that exculpatory statements, when shown to be false, are circumstantial evidence of guilty consciousness and have independent probative force.

So if you find beyond a reasonable doubt that the defendant John Oliver Bryant used a name other than his own in order to avoid subsequent identification, that would be a fact from which you may, but need not, infer a consciousness of guilt on his part.

Now I come to the conclusion, ladies and gentlemen, of this charge.

When we lay down as law the letter, the spirit of the law, that every defendant is presumed to be innocent until the government fulfills its obligation of proving him guilty beyond a reasonable doubt, and all those other propositions of law that I have tried to emphasize and to delineate for

due to the accuser also.

you, each one equally sacred, we must not lose sight of the rights to the other party in this litigation, the plaintiff, the government. We must bear in mind, and I so charge you, an equally vital concept of justice, defined in classic fashion by the Supreme Court of the United States, and hence the law of the land: Justice though due to the accused is

Guilt is personal. Criminal responsibility is rooted in the individual, his intention, his motive, his conduct.

should not hesitate for any reason to return a verdict of not guilty. That would be your sworn obligation. But, on the other hand, if you should find that the law has been violated as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty because in your concept of what is required here that would be the justice of the case, if you so decide. And if that is your decision it will also constitute a clear warning that a crime of this character may not be committed with impunity. The public is entitled to be assured of this.

Under your oath as jurors you cannot and must not allow a consideration of the punishment which may be inflicted upon a defendant if he is convicted to influence your verdict

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in any way. If you did that you would clearly violate your oath. The duty rests exclusively with the judge who upon the basis of a full official report dealing with the defendant's general life pattern of behavior imposes sentence.

The indictment names three defendants. In determining the guilt or innocence of each of these three defendants you must bear in mind that guilt is personal. The guilt or innocence of each defendant on trial before you must be determined separately with respect to him solely on the evidence presented against him, or the lack of evidence.

The indictment is in two counts Each count charges a separate crime. There are facts and elements common to more than one count, but you must consider each count separately as to each defendant and return a separate verdict of guilty or not guilty for each count and each defendant in the indictment.

So Madam Forelady, you will be called upon at the right time to declare the verdict of the jury as to Count 1 with respect to defendant No.1, with respect to defendant No.2, and with respect to No.3. Then you will be asked about Count 2. How does the jury find, guilty or not guilty?

Defendant No.1? Defendant No.2? Defendant No.3?

Very simply, you want to be mighty sure you recognize that the case as to each defendant must be considered

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The verdict for acquittal or for conviction must be unanimous. Each juror is entitled to his own opinion.

You should, however, exchange views with your fellow jurors.

That is the very purpose of jury deliberation, twelve jurors

You have a right to your opinion but you must discuss it with one another and you must give each the benefit of your views.

not one -- not one, not three, not eleven, but twelve jurors.

And so the law says that you must listen to the arguments of your fellow jurors, you must consult with one another, you must reach an agreement based solely and wholly on the evidence, if you can do so without violence to your own individual judgment, and to employ that high degree of genuine courage you justifiably expect especially in these perilous times from your public officials.

You should not hesitate to change an opinion which upon a consideration of all the evidence with your fellow jurors appears erroneous. However, if after carefully considering all the evidence and the arguments of your fellow jurors you entertain a conscientious view that differs from others, you are not to yield your convictions simply because you are outnumbered or outweighed.

The exhibits in this case and a copy of the indict-

2 ment will be sent to you promptly.

If to help you in the course of your deliberations you wish a point or points in the testimony read, please specify exactly as possible just what point you wish the offical reporter to locate. He will have to go through his minutes and locate them. It will be read to you no matter how much time it takes.

Your oath, ladies and gentlemen of the jury, sums up your duty, and that is that without fear or favor to any man you will well and truly try the issues between these defendants and the United States of America according to the evidence given to you in open court and the laws of the United States, and that is what you swore to do.

I have every confidence that you will fulfill your sworn obligation as ministers of justice to render a true verdict based solely and exclusively on the facts and on the law in this case.

If the government has carried its burden in accordance with the evidence and the law as to each defendant, you must not flinch from your sworn duty, you must convict.

But if it has failed to carry its burden as to each defendant, or as to a defendant, your sworn duty is to acquit.

I may have told you in the course of my interrogation of you before you were sworn as American ministers of bear repetition.

justice in this case a historic account. If I did, it will

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One of the greatest judges of our land was Mister Justice Robert Jackson who sat on the Supreme Court of the United States. He was the prosecutor at the main trial at Nuremberg. He was a great judge. He was a great judge not only because he knew what was in the books on the law but because he knew the hearts of the people. He knew humanity -which comes from living. So he had a keen intellect and a deep understanding heart, a rare combination. I had the privilege to have met with him on occasion, and it is the regret of my life that I didn't make it possible to have pursued it more.

Mister Justice Jackson was at a convention of lawyers long before he died and during the intermission they gathered around him and one of them said, "Mister Justice, what do you expect of a judge?" Without batting an eyelash he said he expected him to do his utmost, to call them as he sees them, as they come across the plate, and that's the test for me and that's the test for you. I am the judge of the law and you are the judges of the facts. You call them as you see them, as they come across the plate.

And this I say with measured tones: You have undoubtedly talked about justice in your homes and in your daily

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affairs, in your comings and your goings, as is your inalienable right; the point is that now each one of you sits in the seat of justice. How will you do? Apply your criticism to yourselves. How will you do? Will you call them right and fair and honorably, according to the facts and according to the law?

I have every confidence that you will do exactly that. Now I will ask you to excuse the attorneys and the Court. We will be back very shortly.

. (In the robing room.)

THE COURT: It is now 4:35. We are in the robing room and the jury is out in the courtroom.

What exceptions or requests has the government?
MR. VIZCARRONDO: None, your Honor.

THE COURT: What exceptions or requests does the defendant Best have?

MR. HERWITZ: I respectfully request, your Honor, that you charge the jury as follows:

It is the theory of the prosecution that the persons with whom the defendant Best conspired were the codefendants Simpson and Bryant and there is no evidence in the case that the defendant conspired with any other person. If you find that the defendants Simpson and Bryant are not guilty of the conspiracy count in the indictment, you must also find

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of the entry with intent to rob from the bank robbery statute is untrue as a matter of just plain lexicography on the ground it reads 2113(a) has the same paragraph, so it is exactly the

same statute that we are talking about. To argue it is a

different statute from the bank robbery statute is wrong as

a matter of law and fact, I might add.

It also goes directly to my argument in summation when I argued that this was, in effect, being accused of bank

robbery because the statute is bank robbery.

THE COURT: I get your point.

MR. MURPHY: Secondly, your Honor, the government

charges a conspiracy to violate --

THE COURT: I know that. Why do you spend time

telling me that? Tell me what your point is.

MR. MURPHY: Your Honor quoted in the substantive count, 2113(a). In the material section of that is 2113(a), the second paragraph. The judge charged, when you quoted, the substantive statute, the first paragraph, when we are really talking about the second paragraph, the entry paragraph. The first paragraph has to do with a conspiracy charge because the conspiracy is, in effect, violating the law, and that is the first paragraph; so that's how that first paragraph is relevant. But the second paragraph is really what the substantive count is, entry with intent. In that confusion from that quotation I think it went through the substantive charge problem. It is important to the defendant Bryant because his intent when he enters the bank is the whole thing, it.

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is pivotal to his whole position, and to quote the wrong statute and to talk from that quotation has the effect of obscuring the main issue with respect to the defendant Bryant.

The third point I have -- I miscounted when I said two -- is that inferences from circumstantial evidence are also subject to the reasonable doubt charge of your Honor just as inferences from non-circumstantial evidence is subject to reasonable doubt, and from my hearing of the Court bifurcating two types of evidence into one as sort of non-circumstantial evidence and circumstantial evidence it seemed that the inference from those with respect to circumstantial evidence was not susceptible. I had confusion when I listened to it.

THE COURT: Does the government wish to comment on that which Mr. Murphy said, or anything for that matter?

MR. VIZCARRONDO: No as to the first and third points, your Honor. Especially circumstantial evidence. I think your Honor was clear that the jury had to find circumstantial evidence beyond a reasonable doubt.

THE COURT: He speaks about another statute, the language, the first part of his argument. Did I make an error?

MR. VIZCARRONLO: That's frivolous. There are two statutes, there are two laws within the same section. To the extent that the jury may have been confused by your reference

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to the bank robbery statute, the first paragraph of 2113(a),

I think it may be sufficient if your Honor just tells them

that that statute is relative to this indictment in two ways--

THE COURT: Did I explain what is relevant? That's all I want. I don't want to go out there and add something that is strong pro-government in a sense. We have already covered it. If we have covered it I don't care whether I mention the number or the paragraph. The point is, did I embrace each of the offenses charges in this indictment?

MR. VIZCARRONDO: Yes.

THE COURT: That's all I care about.

Now, Mr. Concannon?

MR. CONCANNON: Nothing beyond the previous record.

MR. HERWITZ: I don't understand the objection that Mr. Murphy made, but if it is valid I would like to take advantage of it, and may we have that on the record?

MR. CONCANNON: I join, your Honor.

(In open court.)

(Marshals sworn.)

number one, to the exhibits. You will recite on the record each of the exhibits you have given to the clerk who will turn them over to the marshal. That ought to be done within the next five minutes.

Number two, see that they get a copy of the indictment, a clean copy.

Number three, ladies and gentlemen, in all my experience before juries in the course of all the years I have been privileged to be a judge, I have said something, and I have repeated it, and I hope I will be permitted to say it over and over again for many cases yet to come:

In a jury case justice rides with the jury because of the enormity of the power that you have to determine guilt or innocence from the facts, and you are the judges of the facts.

I thank you again for your patience. You have been an inspiration and helpful beyond words.

The time has come now when the jury is about to enter upon its deliberations and the two ladies, the alternates, need not carry on further.

I noticed you throughout my judicial eye, the corner of my eye, as I have everyone else. I am grateful to you as I am to each one of them for the undivided attention which you gave and for the show of caring and deep concern. We could never fail in the doing of justice when there is a caring, when people are concerned. It is only when we say, "So what?" or "Big deal!" or "What are you bothering about?" or "Let the other guy stick his neck out," that's when justice

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gets socked in the teeth.

Thank you, both of you, for your participation up to this point. Will you be good enough to step out of the box. The marshals will see to it that whatever belongings you have will be handed to you promptly.

The jury may enter upon their deliberations.

(At 5:15 p.m. the jury began its deliberations.)

(All exhibits in evidence and the indictment were sent into the jury room.)

(Dinner recess.)

(Time noted: 8:45 p.m.)

THE COURT: Just a moment or two ago I got this note from the jury: If a lawyer for the defense did not question a witness' statement, do we assume that the lawyer accepts the witness' statement as a fact?

Of course I am going to answer: Certainly not.

Bring the jury out unless counsel have anything to say.

MR. VIZCARRONDO: Your Honor, excuse me. I think perhaps the answer should be that they are to go on this assumption one way or the other from what the --

anything at all. If a lawyer for the defense did not question a witness' statement do we assume that the lawyer accepts the witness' statement as a fact? The answer is strictly no.

MR. VIZCARRONDO: It depends on what the witness' statement is. If the witness stated, for example, that he was on Fifth Avenue April 24th, 1975 and the lawyer doesn't question it, are we to assume that the lawyer disagreed with it anyway?

THE COURT: I don't see it at all. The failure of the lawyer for the defense to question a witness' statement does not concede that the witness' statement is truthful.

He just doesn't choose to examine him on it, but he doesn't accept the witness' statement by his failure to question him on it.

That's all this note presents.

MR. VIZCARRONDO: Perhaps your Honor's answer should be a little fuller, that he chooses not to question him on it.

MR. HERWITZ: I object to that.

THE COURT: I think the answer as distinctly no.

It is for the jury to determine from the testimony as it

exists whether the charge has been proven beyond a reasonable doubt.

MR. VIZCARRONDO: I think that is fine.

THE COURT: Bring the jury out.

(Jury in box.)

THE COURT: I have your note which reads as follows:

If a lawyer for the defense did not question a witness' state
ment, do we assume that the lawyer accepts the witness' state
ment as a fact?

The answer is no. The lawyer may not choose to question him about it, but that doesn't say that the lawyer accepts what the witness has to say. That is for you, the jury. You don't care about the lawyer's reaction. What you are concerned with is: What is in the record? What it's the record show? What does the testimony show? That's for

you. The tactics or the operation of a lawyer or the advocacy of the lawyer, must be that with regard to anything, he contests it. His client says he is innocent. But the failure of a lawyer to pick a witness up and challenge the witness does not mean that the lawyer admits it, not at all.

So you should take the record as it is given. If it has not been demolished, if it has not been changed, if it has not been tarnished, if it remains clear and convincing, that's for you to determire.

If there is a doubt as to that evidence, that piece of evidence, and you join in the doubt, that's another proposition.

exist with you, in fact the affirmative appears satisfactory and convincing to you, that's what survives. In other words, you weigh the record. You address yourself to what remains in the record regardless of the position taken by the attorney.

Do I answer your question?

Another thing, last Friday, in order to help you in the event you find yourself tied up here today, I sort of outlined to you what was likely to happen. I said that if you didn't arrive at a verdict within a short period of time you might have to go to dinner and you might have to come back after dinner and continue with your deliberations

I didn't go far enough. I gave you the impression that you had to decide it today. If you don't decide it today you can come back tomorrow and we will continue with your deliberations. It is as simple as that.

In other words, there is no time limit, and I didn't intend to set a time limit, but I didn't add enough to eradicate that thought. There is no time limit. Whatever time you think is required for you to arrive at a verdict, you take that time. It is your responsibility. We are here to wait on you. The lawyers are ready. They have done this many times before, so have I. Whatever we can do to help you we are here. So remember, no time limit.

Thank you very much. You may continue with your deliberations.

(At 9:00 o'clock the jury retired to continue its deliberations.)

(Time noted: 10:40; off the record discussion in the robing room.)

(In open court.)

THE COURT: Let the record show that it is now 10:47. About fifteen minutes ago, as I told counsel, I sent word to the jury to ask whether or not there was a like incod of a verdict in this case around 11:00 o'clock. The next thing I know is that somebody said the jury had arrived at a

on your part. After all, you got up reasonably early, I

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suppose, today, but at any rate you have had eleven hours of pretty much concentrated material, and you have been deliberating since about a quarter to 5:00. You went to dinner.

As I told counsel about 10:30, I asked that an inquiry should be made of you as to whether there was a possibility of a verdict or a likelihood of a verdict around 11:00 o'clock.

Word came back that the jury had come to a decision with regard to two defendants as to each of the two counts, but the jury was still deliberating with regard to the third.

Am I correct, Madam Forelady?

THE FORELADY: Yes.

THE COURT: There was no written note and I wanted to check if that information was correct.

THE FORELADY: Yes, your Honor.

THE COURT: The information being correct, the lawyers and the judge think we ought to have the verdict in its entirety and, therefore, we would suggest that you go home tonight. A limousine awaits you to take each one of you right to your house. You will be back here to resume and deliberate tomorrow morning at 10:00 o'clock. We will wait on your tomorrow no matter now much time it takes and what it entails.

Your show of spirit shows us that you understand;
you understand that this is a serious matter and that you are

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bringing to it the best that each of you has to offer in connection with its resolution.

I thank you again, and I mean that earnestly and with great sincerity. I salute the fine show of spirit you have demonstrated.

Remember not to talk about this case. Of course you will think about it. You cannot go in there and deliberate. You cannot show the concern you have evinced here without being affected by this, so you are bound to think about it, but your personal and private thinking has nothing to do with talking to someone else. You do all the thinking you want; owever, I hope you get a night's rest because a tired brain can't come up with much.

Thank you, again, ladies and gent excused.

Marshals, see that these jurors are immediately transported to their homes.

Tomorrow morning you will take the subway along with the judge. You take a limousine tonight and I will take the subway.

Good night, ladies and gentlemen.

(Jury excused.)

MR. HERWITZ: I just wanted to put on the record, your Honor, as I previously advised you, that I have an

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engagement in the New York Court of Appeals tomorrow at 2:00 o'clock. I am leaving my home at 8:30 in the morning to get there.

THE COURT: You told me about it before, yes.

MR. HERWITZ: I have acquainted my client with that
Mr. Best. He knew about that before. I have told him that
Mr. Murphy has agreed to protect his interest while I am not
here, and I am sure your Honor will see that the interest
of Best is protected too in any legal matter that would come
up. I just want to put that on the record and have Mr. Best's
approval.

DEFENDANT BEST: Yes, sir.

THE COURT: Mr. Best, I must ask you under the circumstances just a couple of questions.

Did you hear and understand what Mr. Herwitz just said to you?

DEFENDANT BEST: Yes.

THE COURT: Is that agreeable with you?

DEFENDANT BEST: Yes, sir.

of this trial, including the verdict of the jury, Mr. Herwitz will not be here. You tell me that it is perfectly all right with you so long as in his absence Mr. Murphy, the attorney for Mr. Bryant, will also look out for your interests and

make such statements on the record as, in his good judgment, best serve to protect your interests?

DEFENDANT BEST: Yes, sir.

THE COURT: That's agreeable?

DEFENDANT BEST: Yes, sir.

MR. HERWITZ: Whatever motions might be necessary,

I presume your Honor would grant me leave to make those

motions some other time if the verdict should be adverse to

my client.

Mr. Murphy will make the necessary motions. If you want to make additional motions you do it in accordance with the rules of the court. That's always open so far as I am concerned. If there are any additional remedies that the law provides you exercise your rights under those sections or rules.

MR. VIZCARRONDO: Your Honor, I have a question.

The exhibits are in the jury room. What should be done with them?

THE COURT: Indeed. Marshal, you will have to get the exhibits. Will you double check them before you go.

I'm sorry but I don't know how else you can do it. Stay long enough to see that they are the exhibits that you sent in.

I don't know how else you can do it.

If there is nothing more, gentlemen, I will bid you good night.

There is nothing else, I take it?

MR. HERWITZ: Since I will not have an opportunity to see your Honor before I leave, may I express my appreciation for the courtesy that counsel have received from the Court and also I offer my respect to the United States Attorney for the fairness with which he conducted this trial, except for those points that I have made.

THE COURT: Thank you very, very much. Good night.

(The proceedings were adjourned to September 9,

1975, 10:00 a.m.)

(Record read.)

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MR. VIZCARRONDO: May we approach the bench,

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your Honor?

(At the side bar.)

THE COURT: Yes.

MR. VIZCARRONDO: I ask the Court remind the jury that the statement is to be considered against Best and is not in the case against the other defendants.

MR. GIPSON: For the record, I do, in this one instance concur with the United States Attorney. I was going to request that there be an instruction that it be only limited to the particular party who is the subject of this statement.

I have a further motion I would like to make but that can wait until such time as the Court instructs the jury.

MR. MURPHY: On behalf of Mr. Herwitz I move that the cross examination which went to the waiver rather than the statement be read.

THE COURT: Denied. The jury me a / called for the statement.

(In open court.)

THE COURT: Ladies and gentlemen, you remember in the course of my charge to the jury I emphasized that statement is to be held only against the defendant Best. Do you remember that? It cannot be used even in the remotest sense as binding in any sense whatever on the co-defendants.

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It is clear to me from the way you nod your head that you learned your lesson very well on that score.

You may continue with your deliberations.

(The jury left the courtroom to resume deliberations.)

THE COURT: Mr. Gipson said at the side bar only a moment or so ago that he had some motion to make. I afford him that opportunity right now.

MR. GIPSON: Your Honor, at this part of the trial

I move for a mistrial with regard to the defendant John Bryant

for the following reasons:

This jury commenced deliberating at 4:45 yesterday. It is now almost 11:45 a.m. the following day. The jury immediately has given no indication that it is hopelessly deadlocked; nevertheless, there is some inference that the jury had a separate verdict at one part of the trial while meanwhile counsel and the Court gave their own speculation or conjecture what defendants may have been found guilty or not guilty with respect to that split verdict; but it was only conjecture and speculation on the part of both counsel and the Court itself, with all due respect.

As of this time there is no clear indication that the jury has found Mr. Bryant guilty of Count 1 or Count 2 of the indictment. In this particular regard we have before

the Court the very statement that counsel for Mr. Best,

Mr. Herwitz, brought to the Court's attention continually

through the trial as raising certain constitutional questions

with regard to its admissibilit, More particularly, I am

referring to the fact that the statement -- I will refer

directly to the f ct that Mr. Best raises questions contitu-

tionally as to this aspect.

The Court has instructed this jury as to inferences concerning the defendant Bryant. Nevertheless, in spite of that instruction, the Court must take notice, and I respectfully submit, judicial notice, of the fact that it is only logic that logistically speaking the jury would assume that second person referred to based upon the facts and circumstances of the case would be the defendant Bryant. At this posture there is no other indication that there has been any finding that the defendant Bryant would be found guilty of 1 or 2. It appears that the only evidence, or the main piece of evidence, that is being given consideration with respect to guilt or nonguilt of Mr. Bryant is a statement of Mr. Best.

At one posture of the case, as I recall, and the record should so reflect, I moved and made a motion of a severance as for the defendant Bryant based upon the statement made by Mr. Best. I recall the Court denied the motion.

We are at this posture of the trial: The jury has

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prejudices the case of Bryant, and at this posture the jury is now considering this statement.

In the light of the fact that we do not have a verdict I respectful submit Mr. Bryant is being prejudiced;

been out more than a reasonable period of time, and they

statement. The statement, I respectfully submit, unduly

came back with the question concerning that same particular

In this regard I move for a mistrial as to the defendant John Bryant.

his contitutional rights, the Fourteenth Amendment, and/or

applicable sections, are being deprived.

THE COURT: Does any counsel for the defense wish to answer to that or is that satisfactory?

Does the government wish to say anything?

MR. VIZCARRONDO: Briefly, your Honor, I am not sure I understand what the motion is.

THE COURT: The motion is for a mistrial.

MR. VIZCARRONDO: Correct. I am not sure I understand what the basis is. If Mr. Gipson is complaining about the admissibility of the statement, I think your Honor has ruled on that, in addition to giving the proper cautionary instruction.

If he is complaining about the fact that the jury has been deliberating so long without reaching a verdict,

I would ask that the jury be brought in and asked to give the verdict they have already reached.

I would just point out that the government was amenable to that yesterday, last night, but because of the opposition of counsel for Bryant we went along with letting the jury continue their deliberations.

If Mr. Gipson no longer is satisfied with this state of affairs, the government will gladly consent to having the jury bring back whatever verdict they have now.

in this case, as I do attorneys in other cases, and we entered into an informal discussion. They all participate gladly and helpfully in order to come to a conclusion as to what is best with respect to a given situation. In that spirit I called the attorneys in last night and I said, "I have learned that the jury has arrived at a verdict with regard to two of the three defendants." I didn't inquire of that. I merely asked, "Are you likely to arrive at a verdict by around 11:00 o'clock?" Instead of answering that question the jury volunteered that it had arrived at a verdict with regard to two of the three defendants and as to each of the two counts. So we began to speculate and figure out what was best to be done: Should we take the verdict? Should we allow them to continue until they had arrived at a verdict with regard to the third defend-

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ant?

We all agreed that we should wait until the jury completed its mission. I was the very one who suggested you might very well want to urge that whoever they have found against or for anyone, let them continue their deliberations with regard to everybody. If, for instance, someone was going to be convicted, that further consideration might change their minds.

All the lawyers thought that was common sense and no harm in it at all. It is not a game of trying to get some advantage.

So let the jury think the thing through thoroughly and let them tell us how they find in regard to each defendant on trial. It is as simple as that.

MR. GIPSON: Your Honor, very briefly, for clarification of the record, have you raised the point with respect to longevity, the longevity with which the jury has been deliberating? In the light of the engevity with which the jury has I en deliberating we come to the fact that the jury substantially appears to base its verdict and deliberation now upon Mr. Best's statement, and in that light I move for a mistrial, that that is being considered apparently quite substantially in its deliberation of final determination.

MR. VIZCARRONDO: The government would just like

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to say that it is quite clear, as your Honor as instructed them, that any consideration given to that statement is in the case against Best.

THE COURT: Gentlemen, thank you.

Motion denied.

(Luncheon recess.)

(Time noted: 4:15 p.m.; in the robing room.)

THE COURT: It is now 4:15. I have called counsel into the robing room and I have had the benefit of their reaction to the last note which reads:

Judge Cooper, 3:30 p.m. As of now we are at a deadlock on one defendant on two counts. The deadlock is 11 to 1 since last night and I don't know which way to go from here. Sincerely, The Forelady.

The question I have put to my brothers at the bar is what does justice demand we do. I thought that rather than go out into open court and suddenly read this into the record and take lawyers unaware and make them give me an answer right there and then is not my way. I think they ought to think about it and talk about it and see what is the best thing they can do.

Before I forget, I do want the record to show with respect to the argument last advanced by Mr. Gipson in support of the motion for a mistrial that I neglected at that time to

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say that in a similar offer with regard to the issue that then came up before us, I was the one who pointed out that possibly it would be the better part of wisdom not to get the jury's verdict as to two of the defendants and let them continue as to the third. The Court said that to counsel whereupon Mr. Gipson, when I called upon him in the robing room to give me the benefit of his reaction, said that he was for the proposition that we should not take the verdict but should wait until the jury had completed its mission with regard to each of the defendants.

I must say that the government's representative had urged that it might be a good idea to take the verdict, but then said after listening to Mr. Gipson that the government was in agreement. The government was not going to oppose Mr. Gipson's suggestion.

I turned to other counsel and all of us came to the same conclusion.

Coming back to this instant conference, I want the record to show that I had the benefit of their reaction.

The government's representative is for the proposition that the Court should charge the jury, give the jury the Allen Charge.

Counsel are going to oppose it.

That can be done and repeated out in open court

because I want the defendants to hear what this note is and what we are doing about it.

Let me continue:

Mr. Concannon, I take it that you feel we should not take a verdict now, that we should wait until the jury comes in with the results of the entire mission?

MR. CONCANNON: Actually, I would prefer a partial verdict now and no Allen Charge, just to take the verdict; if there is to be an Allen Charge, just ask them to keep trying awhile longer but nothing beyond that.

THE COURT: I will tell you candidly that I will give them the Allen Charge. We discussed that off the record during the last ten minutes and I told you the kind of Allen Charge I would give. I said I would give the Allen Charge fashioned by Judge Weinfeld, which includes reference to the Supreme Court's language:

That I do not intend to urge anybody to reverse a position that he or she may have taken, or still feels, after further deliberation. That that is the same stand that should be taken and I do not intend to urge anybody to reverse his or her position.

I take it that you must recognize that I am telling you -- and I am putting you all on notice -- that I intend to give the Allen Charge.

Since I am going to do it, do you still feel, in the light of that, we should take a partial verdict?

MR. CONCANNON: Yes, your Honor.

THE COURT: What do you think, Mr. Murphy?

MR. MURPHY: Speaking on behalf of Mr. Herwitz for the defendant Best, I would oppose taking a partial verdict.

THE COURT: And Mr. Gipson, what do you say on behalf of Mr. Bryant?

MR. GIPSON: On behalf of Mr. Bryant, I, like Mr. Murphy, would oppose a partial verdict.

THE COURT: Does the government, after I charge
the jury, give them the Allen Charge, would the government
oppose not taking a partial verdict and await the final result
of the jury's deliberations?

MR. VIZCARRONDO: The government would not oppose it as long as it is clear from the record that Mr. Gipson is opposing it.

THE COURT: It is very clear that he is opposing it.

The Court would say if you did oppose it the Court

would still feel that this is not a gamble or a puzzle or a

game, and that the jury should have full opportunity to con
sider and reconsider the results of its deliberations up to

now and up to the final pronouncement as to each of the

defendants involved.

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So I am grateful to the government for being broadminded either way, and I am grateful to counsel who support that view. I am also grateful to Mr. Concannon who, frankly, believes that the best interests of his client would be served by taking the partial verdict now.

Thank you, gentlemen. You can go out into the open courtroom. I shall make a recital. Please wait for me a moment. I will take a recital of what this note contains and then I am going to say: Gentlemen, I am going to deliver the Allen Charge. Then you will take your objections to the Allen Charge, and the record is clear as to how you feel about taking the verdict now, so I don't have to repeat that.

MR.CONCANNON: Frankly, I don't see why it has to be repeated at all. The note could be read.

I have my objection here.

THE COURT: Except that we have been coming in here and we ought to have that phase of it formalized. That is the kind of step that should not be disposed of in chambers. It is the kind of thing that each defendant has a right to know.

(In open court; jury in box.)

THE COURT: There has been a discussion in the robing room with regard to a note received. I want each defendant to hear what that note has to say. This is the note

from the jury: Judge Cooper, 3:30 p.m.: As of now we are at a deadlock on one defendant on two counts. The deadlock is 11 to 1 since last night, and I don't know which way to go from here. Sincerely, The Forelady.

I intend to give the jury what is commonly referred to as "the Allen Charge." I will then send them back for further deliberation. I do not intend to take any partial verdict. I hold very, very simple to the proposition that the last word spoken by the jury with regard to which deliberations should be the last word with respect to each of the three defendants. It is not at all unlikely that a juror, having made up his mind as to two defendants, may change as to one or both before the last word is spoken.

An idea may suddenly dawn upon one of the jurors and that may compel that juror to take a different position. The point is I want them to have all the time they want to reflect on their verdict in regard to each and every one of the defendants on trial.

Counsel have told me in the robing room that outside of counsel for the government each counsel for the defendants opposes the Court's reading the Allen Charge to the jury.

Is that the position of the defendant Best?

MR. MURPHY: It is, your Honor.

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THE COURT: Is that the position of the defendant

MR. GIPSON: If I may have a minute to confer with Mr. Murphy --

THE COURT: Certainly.

(Pause)

MR. GIPSON: Yes, your Honor, having had the opportunity to confer with Mr. Murphy. In light of the Court's position as to its refusal to accept a partial verdict in this manner, I would agree with the Court with respect to giving the jury the Allen Charge. I would agree with the Court wholeheartedly in regard to giving the Allen Charge to the jury on behalf of Mr. Bryant.

THE COURT: So I understand then, Mr. Bryant does not oppose the Court giving the Allen Charge?

MR. GIPSON: No opposition, your Honor.

THE COURT: Mr. Concannon?

MR. CONCANNON: Mr. Simpson has much opposition to that, as you know.

MR. VIZCARRONDO: Excuse me, your Honor. May I be heard briefly?

Just to clear the record, Mr. Gipson referred to your Honor's refusal to take a partial verdict. I believe the correct statement is that your Honor is honoring the wishes

of defense counsel not to take a partial verdict.

THE COURT: It is both. Mr. Gipson was the strongest advocate that the Court should not take the partial verdict and urged me, and still urges me, as I understand him in the last robing room conference just ended a few moment ago, that he wanted me not to take a partial verdict.

Is that your position, Mr. Gipson? Yes or no?

MR. GIPSON: Yes, your Honor. That's my most

strenuous position.

beginning when we heard that they were ready to report on two defendants and not on the third you lways have taken the position, have you not, in the robing room, that we should not take a partial verdict and thatthey should come in after they have completed their duty, they should come in with a verdict at that time with regard to each one of the three defendants?

MR. GIPSON: That's right, your Honor.

Your Honor, we have no indication now as to what period of time the Court would consider. I don't want to be brazen and raise a motion for a mistrial on the ground of it being a hung jury.

THE COURT: Would you have any objection if I interrupted you?

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I have decided to give them the Allen Charge.

Suppose I give them the charge, send them back to the jury room and then you make your motions.

MR. GIPSON: I don't want to have to make a motion.

I want some indication from the Court, if possible, as to

what period of time the Court will consider reasonable before

we reach an area wherein it would be considered to be a harm

jury.

would like to just give the jury the Allen Charge and give
there reasonable. fair chance to reflect on it and to proceed
according to what their consciences and their oaths demand
of them -- no matter what inconvenie ere is to me or to
you, and so forth, I cannot do anything about it.

We will do the best we can as time marches on.

That's the best answer I can give you now.

Bring the jury in, marshal, please.

(Jury in box.)

THE COURT: Your note, ladies and gentlemen, signed by your forelady, bears the hour of 3:30 p.m. and reads:

Judge Cooper, as of now we are at a deadlock on one defendant on two counts. The deadlock is 11 to 1 since last night and I don't know which way to go from here. Sincerely, J.Gitlin.

I have conferred with counsel with regard to your

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note and they join me in again saluting you for the show of concern and caring that you have evinced.

The case was given to you yesterday at about 4:45. You went to dinner last evening and you took a minimum time for your dinner, and then you returned and went about your mission until about 11:00 o'clock. If I had asked you to go on you would have gone on.

You returned today at 10:00 o'clock and started right in with a continuation of your deliberations. You were content to send out for lunch and satisfied yourselves with sandwiches, or whatever was brought in, and you have been hard at it since you completed that repast. What is there but overwhelming proof of the high order of your accomplishment. What I am about to say, I say with utter sincerity, and I will say it slowly, extraordinarily slowly, because this is said by the judge not in an attempt to coerce or induce or influence anyone to change a vote or a position with regard to the evidence, but the fact of the matter is that you are still undecided with regard to one of the three defendants on trial, and I repeat that I want to make it clear that what I am about to say to you is not with a view to coercing you into reaching a verdict or persuading those jurors who after thorough consideration, deliberation, and argument have reached a conclusion to change that conclusion. I do believe,

however, that some remarks by the Court may possibly aid you in your deliberations.

This is an important case. The trial of this case was comparatively simple. The fact issues have been sharply delineated. The trial has been expensive to both parties.

If you should fail to get a verdict as to one defendant the case is left open and undecided as to that defendant.

Like all cases it must be disposed of sometime.

There appears absolutely no reason to believe that another trial would not be equally expensive to both sides and to the government, nor does there appear any reason to believe that the case can be tried again more expertly or more exhaustively than it has been on either side. Any future jury must be seed in the same manner and from the same source as you have been chosen.

So there appears no reason to believe that the case would ever be submitted to twelve jurors more intelligent, more impartial, and more competent to decide it, or that more or clearer evidence could be produced on behalf of either side.

While undoubtedly the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to

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secure unanimity by a comparison of views and by argument among the jurors themselves. It is normal for jurors to have differences. This is quite common. So do judges have differences.

Frequently jurors, after extended discussion, may find that a point of view which originally represents a fair and considered judgment might well yield upon the basis of argument, further discussion, and upon a further review of the facts of the evidence.

requently further consideration may indicate that a change of original attitude is fully justified pon the law and the facts.

I quote now from a statement which is contained in an opinion by the Supreme Court of the United States:

Although the verdict must be the verdict of each individual juror, they should listen with a disposition to be convinced of each other's argument. If a much larger number were for conviction, a dissenting juror should consider whether his doubt, or her doubt, was a reasonable one which made no impression upon the minds of some men or women equally honest, equally intelligent as himself or herself. If upon the other hand the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of the judgment which was not concurred in by the

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majority.

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It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment or that he should close his ears to the arguments of men and women who are equally honest and intelligent as himself, or herself, who bear the same responsibility, serve under the same sanction of the same oath, and have heard the same evidence with, we may assume, the same attention and an equal desire to arrive at the truth.

Remember at all times that no juror is expected to yield a conscientious conviction he or she may have as the weight or effect of the evidence. But remember also that after full deliberation and consideration of all the evidence it is your duty to agree upon a verdict if you can do so without violating your individual judgment and your conscience.

Consequently, I will ask you to retire to the jury room to continue your deliberation and carefully reexamine and reconsider all the evidence bearing upon the questions before you.

We are determined, ladies and gentlemen of the jury, not to receive any partial verdict. We want to receive, if possible, your verdict as to each defendant.

You will take, therefore, and give consideration --

and serious conderation, as I feel in my bones you will -to what I have just said. Remember, this is not an attempt
by the judge; it is done pursuant to the judge's interpretation of the law, of what he is compelled to do at this hour,
and in the light of the note that you sent in last.

You are directed to continue with your deliberations to the end that you can come in with a verdict, if it
is at all possible, with regard to each of the three defendants.

You may continue your deliberations.

(The jury resumed its deliberations.)

THE COURT: Mr. Gipson, the Court is all ears.

You said you had something, some motions to make. It is now a quarter to 5:00. Take you time, raise your voice so that I can hear every word you say, and take whatever you need to present what is on your head.

MR. GIPSON: Your Honor, it is now, I direct the Court's attention, approximately 4:45. Earlier today, about 11:35, I made a motion for a mistrial on behalf of the defendant John Bryant. At this posture I make the motion again on behalf of Mr. Bryant based upon the fact that the jury is now, during the course of the better part of yesterday and has been out during the entire portion of today, at this posture, your Honor, there is more than a likelihood that the jury is deadlocked -- not in the sense that we have, as

indicated by notes and notations from the jury, one juror is undecided and he is preventing the jury from having a unanimous verdict from all three defendants. While the Court and defense counsel have expressed their opinion as to what the outcome might be, we don't know what it is. We don't know whether or not it is an acquittal for all three or whether or not if there was a unanimous decision it would be a conviction for all three.

Nevertheless, in the light of the fact that the jury had raised the question earlier this morning concerning the statement made by Mr. Best and that statement referred to a second which the evidence supports inferentially was, in fact, the defendant John Bryant.

Your Honor, based upon the fact that the jury has been out yesterday and today and the question the jury has raised at this posture, in light of the fact that the Court has now read the Allen Charge, I respectfully move for a mistrial on behalf of the defendant Bryant and that this jury is hopelessly deadlocked as to that matter.

THE COURT: Do other counsel for the defense wish to join or say anything at all with respect to what Mr. Gipson has just placed before the Court?

MR. CONCANNON: Just to join in the application.
Only to join in his application for a mistrial.

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MR. MURPHY: On behalf of Mr. Herwitz for Mr. Best I also join.

MR. VIZCARRONDO: The government, of course, opposes, especially in the light of the consistent position of two of the defendants refusing to take partial verdicts.

THE COURT: Motion denied.

Unless there are other motions or anything else at this time, gentlemen, we will have to await the pleasure

of the jury.

Announce a recess.

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2	United States of America
3	Stanley Simpson, 75 Cr. 436 John Oliver Bryant and
4	Earl Best,
5	Defendants.
6	October 9, 1975 12:40 p.m.
7	BEFORE:
8	HON. IRVING BEN COOPER,
9	District Judge
10	APPEARANCES:
11	Paul J. Curran, Esq., United States Attorney
12	Paul Vizcarrondo, Jr., Esq., Assistant United States Attorney
13	Thomas Concannon, Esq.
14	Attorney for Defendant Simpson
15	Daniel H. Murphy II, Esq., Attorney for Defendant Bryant
16	Victor J. Herwitz, Esq.,
17	Attorney for Defendant Best
18	
19	THE CLERK: United States of America versus
20	Stanley Simpson, John Oliver Bryant and Earl Best.
21	Counsel, are you ready?
22	MR. HERWITZ: For the defendant Best, ready.
23	MR. CONCANNON: Ready.
24	MR. MURPHY: For the defendant Bryan, ready.
25	THE COURT: Gentlemen, before you say anything,

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I would like you to know that I have read with great care repeatedly each of the reports from the probation department dealing with each defendant.

Does the government wish to say anything now that we are proceeding to sentence?

MR. VIZCARRONDO: No, your Honor.

THE COURT: I would be glad to hear from counsel.
Won't you all please take your seats.

MR. CONCANNON: Your Honor, shall I begin?

THE COURT: Whoever wishes. You know my respect

for all the attorneys here. I will leave that to you.

MR. CONCANNON: Thank you, your Honor.

May I ask at this time -- I have not had a chance to see the presentence report and I would like to ask for an opportunity to review that.

THE COURT: The application is denied. It has been my policy always to regard the probation report as a report from the probation department to the judge, and it is a confidential report.

However, I always have in my years as a judge acquainted the defendant and his lawyer at the time of sentence with respect to any matter of significance that was not brought out before me during the course of the trial. There is no such item here. Therefore, I see nothing gained by

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turning it over.

I go pretty much on the general behavior pattern of each one of these defendants. A recial of education, work record, matters of that kind, prior criminal acts, and so forth. But there has been no additional serious charges other than what such a general approach would reveal.

MR. CONCANNON: Thank you, your Honor.

I suppose it is probably not really necessary, but I would like your Honor to recall, if you will, some of the events that were revealed at the trial.

Mr. Simpson had very little significance in so far as the case was concerned. As I well know, the jury did convict him of the second count. It seemed to me to be a compromise verdict of sorts because it seems to me that if they were to convict him of just the one count what would have probably been more appropriate, given the evidence, would have been to convict him on the first count, and I suspect they were probably trying, in some fashion —

THE COURT: That is absolutely valueless for me.

You are asking me to figure out what the jury did and why
they did it. They were within their rights to have done
exactly what they did, and I am bound by what they did, so
save your voice, I am not going to be impressed with that
kind of argument at all.

Next.

MR. CONCANNON: I understand that, sir, but I would ask you to recall Mr. Simpson's limited role, end, indeed, it is a role which he suggests is not a role at all, that he actually was not taking part in this, that at the time the other defendants were arrested he was some five, four and a half to five, blocks away from the place, the location of the arrest. The car which was supposed to be a getaway car was located some three and half blocks away from the place of the arrest, and he was not in the car at the time.

The other defendants did not have access to the car, so it couldn't have been left in a place where they could have had access to it, and also somewhat importantly I think the car was pointed in a direction, parked and facing in a direction heading towards the Manufacturers Hanover Trust Company branch, suggesting that by no stretch could it really be a getaway car.

I ask your Honor to consider these things in sentencing Mr. Simpson.

THE COURT: Mr. Concannon regardless of what the Judge does in this case, I want you to know, and I want your associates to know, that I admire the way you have gone about your mission. It was a tough case, extremely tough, and you

1 ,D5 did the best you could with it, each one of "ou. 2 I don't know whether I have said that already. 3 It won't harm to repeat it. I think you have extracted as much as you possibly could, Mr. Concannon, at this particular 5 6 juncture. 7 MR. CONCANNON: Thank you, your Honor. 8 THE COURT: Very well. 9 Will you have Mr. Simpson rise. (Defendant Simpson rose.) 10 THE COURT: Mr. Simpson, is there anything you 11 wish to say to the Court before sentence is imposed? 12 MR. SIMPSON: Yes, sir, your Honor. 13 I would like to make it known that I was working 14 and had a job before I got locked up for this here charge, 15 and that I have talked with my boss on that job. He assures 16 me I can start back upon my release. 17 Also, I have a little daughter which is five years 18 old, and there's no way or means of taking care of her by me 19 being locked up. 20

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been working.

THE COURT: Would you believe me, Mr. Simpson, if I were to say to you that I am greatly concerned with the welfare of your child, who I do not know? Would you believe

That's my history. Since I have been home I have

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MR. SIMPSON: Yes, sir.

THE COURT: Do you know that I look upon you as an unbelievable creature who would dare do what you did to that little girl? That's your love as a father? You give me that stuff and you want me to eat it?

I have been on my own since I was ten. I have seen rot, I have seen hunger, in my time. I have seen people physically crippled rise to the heights. And I look pon you, your body, the strength that you've got, and how you have wasted it all, and the years you have spent in jail already, your own criminal record. So you've got a little child. That didn't stop you. That child, who has to grow up, I wonder whether you ever stopped to think what it would mean to that child if her classmates got to learn that her papa was a cheap, two-bit punk who had gone to jail over and over again, and her schoolmates would laugh at her and jeer her.

And I've seen them in my time go to an insane asylum as a result of that torment. You did it to her, not the Judge. You, no one else but you. So when you give me that stuff I gag, I can't take it.

> Is there anything else you want to say to me? MR. SIMPSON: No, sir.

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THE COURT: Sit down.

(Defendant Simpson resumed his seat.)

THE COURT: Next attorney.

MR. MURPHY: For the defendant John Bryant, your

Honor.

The Court has my letter to the Court on this defendant, and is fully familiar with the facts of the case. In my oral statement I would remind the Court of the three reasons for punishment after a crime as most commentators talk about it: Punitive against the defendant to punish him for what he did; to prevent others from committing similar crimes; and rehabilitation.

This case really is a case about three men, or two men particularly, who entered a bank with the intent to rob it, and left that bank without ever having implemented that attempt. So I ask the Court to consider when it is sentencing John Bryant, that the penalties of retribution against him for the offense against society are very much attenuated in this case because of the nature of the case where the defendants, although having been found by the jury to have had the requisite intent, and to have performed sufficient overt acts to be guilty, still have not the same crime committed as those who put peoples' lives in jeopardy.

By way of rehabilitation, this man has had a few

years in jail, and he is a young man at this time.

I would ask the Court if it could to please exercise some mercy on him, to give him a chance to rehabilitate himself. He has a spark within him of rehabilitation because of the nature of the crime that was committed. It was an attempt which was never implemented. It was stopped by this defendant himself.

I ask this Court in its mercy not to blow out that spark, but to please give this man some chance by the exercise of its mercy so that he will be able in a reasonable period of time to rehabilitate himself.

Thank you.

THE COURT: Stand up, Bryanc.

(Defendant Bryant rose.)

THE COURT: Is there anything you wish to say to the Court before the Court imposes sentence?

MR. BRYANT: Nothing at all.

(Defendant Bryant resumed his seat.)

THE COURT: Mr. Herwitz.

MR. HERWITZ: If the Court please, naturally, in asking your Honor to do what your judicial mandate requires you to do I must assume that the jury's verdict we correct, as your Honor must assume it, and I must confess and admit and concede what is obvious, that the offense of which the

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defendant was found guilty was a serious offense.

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has had a considerable prior record of involvement with the

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I cannot overlook the fact, and I am sure your Honor is not going to overlook the fact, that this defendant law.

If your Honor is to make a judgment surely on the basis of the record before you I have no basis, your Honor, to stand up and ask for mercy. I would like to say this, however. I have gotten to know Mr. Best as a result of my assignment here, and I am sure that your Honor's experience coincides with mine that sometimes it is difficult to understand, when one speaks to a seemingly rational person, how can they possibly be involved in what they are involved in.

I not only got to know Mr. Best, but I got to know his fiance, a very nice, decent, upright person who is in court, been in court throughout the proceedings, the kind of person that I, and I think if your Honor knew her you would have confidence in. I have said to myself, "If such a person could have a regard for Mr. Best and a love for him and a concern for him, there must be something about Mr. Best that just doesn't appear on the cold record before your Honor."

I'm only going to say that I think despite the record there may be some spark of hope, as dismal as the record is,

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your Honor, and I only ask whatever sentence your Honor imposes that it be imposed in such a way -- and I assume it will be imposed in that way -- that the parole authorities will have the power, if they can see any substantial change in the personality and the motivation of Mr. Best, that they can then in accordance with law and in accordance with the record do what they think best at such time as it may appear proper.

I hope I haven't spoken out of turn in what I have asked your HOnor.

THE COURT: No, you haven't spoken out of turn. What you have said is impressive. Your evaluation of what you have beheld as a lawyer and as an officer of this court in the years that I have known you, you can't throw that into the discard. It's something to consider. So that, in answering you directly, you spoke right to the point.

Stand up, Best.

(Defendant Best rose.)

THE COURT: What is it that you wish to say, if anything, to the Court?

DEFENDANT BEST: Nothing, your Honor.

(Defendant Best resumed his seat.)

THE COURT: I want to say something to you, and to your co-defendants. As your lawyers will tell you, I don't

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have to say anything. All I've got to do is mete out sentence and that's the end of it. The marshals will move forward and take you.

But I've never done it that way. For good or for bad, I always tell a defendant what it is that prompts me to hand out the sentence that I impose. Not because I want to win them over, not because I think that it's going to make too much difference, but because I want him to see after he reflects on it just how a judge looks upon him, and why it is that the judge was inclined to mete out the sentence that was actually imposed.

Each one of you is a comparatively young person, and it is horrifying as I go through your probation reports to see what a human being can become when he hasn't got a decent goal. The record of both of you is unbelievable.

I have seen thousands of cases. Your criminal record already makes you an old timer at crime. This is the kind of recital I see for a man who has lived forty, fifty years. I don't see it when it comes to a comparatively young human being.

My concern is what is best for the defendant and what is best for the community. If anybody committed a crime against Simpson's little girl and was brought before the court and found guilty, Simpson would be the last human being on earth to ask the judge to exercise any compassion.

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He would want that creature burned in oil.

So I've got to ask myself whether I can let Simpson out, whether I can let any of these defendants out. knowing that they are already so deeply involved in the commission of crime that without more, just because they say, "Judge, I'll never do it again, and give me a chance to go back to my little girl," and another defendant, "Give me a chance to bask in the glory of a human being who loves me that shows I must have changed my course and my values," the judge can't go by that. It's something, but it isn't enough by a long shot.

I want to know what is going on in your head, what makes you do this. No one has offered anything on that because they don't know. Well, I want to know what makes you do this, what is there in your mind, your soul, your whole human being; what makes you behave that way?

So I want you studied. I am willing to take the time. I want another doctor to look at you. I want to see whether or not there is a chance to do something other than throw you in for a period of years where they will give you a cell number and where you will meet for exercise and you will go back to the cell for a period of years.

You may have to go eventually to a place of confinement, but let me at least know what the potential is,

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what do the doctors think. And so I am going to direct that there be a thorough examination of each one of you. I want a mental examination, a physical examination, from head to toe.

I want to know whether there is an answer other than to send you away for a good, long time.

The law makes it possible for the judge, if he wants that, to direct that it be done. You're lucky that in this court there is such a weapon, or that there is such a course.

Do you know what I am saying, Simpson? Do you understand what I am saying?

DEFENDANT SIMPSON: No, sir.

THE COURT: You don't understand any of this?

DEFENDANT SIMPSON: No, sir.

THE COURT: Do you understand what I am saying,

Bryant?

DEFENDANT BRYANT: Yes, sir.

THE COURT: Do you understand, Best?

DEFENDANT BEST: Yes, sir, your HOnor.

THE COURT: When that report comes in I'll weigh it, I'll study it. I will then decide what to do with regard to a final sentence.

Do I expect you to cooperate with the doctors?

No. Is there a chance that you will? Yes. Do I think

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that you are so ignorant that you think you can pull it over the Judge? I think exactly that.

Is there a chance that you may think that the Judge is really trying to find out what is best to do with you? I think there is a chance of that. So that's the reason I am taking the chance.

Do you think that I look upon you as defendants who say, "This judge has a job to do, he's get to do that job? He could have thrown me right there and then into the can, but, no, he wanted a study made of me so that he could base his sentence on me as a human being and not just the act that I committed?" Do I expect you to understand that?

No. And even if you did understand it, would you appreciate it? No.

There is not much chance. But is there something of a chance, judge? Yes, a small one. So I am taking it. If you're wise, if you've got anything up here at all, Best would say, "I owe it to my gal; yes, I want to have myself studied so I don't go on for the rest of my days dragging her into the gutter where I am right now."

And Simpson will say, "There's something to what the Judge has to say about my child, my flesh, my bone.

What do I owe that kid, a career of crime and drag her into the gutter? So I'm going to take advantage of it. I'm going

MD 15 1 to try to find out why I do this all the time, spending time 2 in jail. I ought 'a be suited for something better in life." 3 That you will think that way, small chance. 4 I'll take that chance. 5 Now, Mr. Vizcarrondo, what does the law provide 6 with respect to Simpson as the maximum that I must announce 7 on the record now? 8 MR. VIZCARRONDO: Twenty years, five thousand 9 dollars fine. 10 THE COURT: What does the law say, Mr. 11 Vizcarrondo, with regard to the maximum sentence which I must 12 now announce with regard to the defendant Bryant? 13 MR. VIZCARRONDO: Twenty years imprisonment, 14 and \$5000 on Count 3; five years imprisonment and \$10,000 15 fine on Count 1, to run consecutively, so a total of 25 16 years imprisonment and \$15,000 fine. 17 THE COURT: And what does the government say is 18 the total or the maximum that I can impose on the defendant 19 Best? 20 MR. VIZCARRONDO: The same as with Bryant, 21 twenty five years imprisonment and \$15,000 fine. 22 THE COURT: Does counsel differ with what has 23 just been said by the Assistant United States Attorney? 24

MR. CONCANNON: No, your Honor.

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THE COURT: Very well. Then he is correct.

The Court has in mind that the law, 18 USC, Section 4208 (b), enables the Court to sentence Bryant and Best to commitment for study under the provisions of that Section.

desires more detailed information as a basis for determining the sentence to be imposed, the Court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study, the results of such study, together with any recommendation which the Director of Prisons believes to be helpful in determining the disposition of the case, shall be furnished to the Court, unless the Court grants time not to exceed an additional three months for further study."

That is exactly what the Court wishes to accomplish with regard to the defendants Bryant and Best, and, accordingly, the maximum announced already by the learned Assistant United States Attorney is adopted by the Court and Bryant is sentenced to the maximum already announced, with the distinct understanding, and the Court says so right now, that the Court does not intend to impose the maximum on Bryant, but the law says that before I can get the study I must pronounce upon him the maximum sentence

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which the law imposes. So that for Bryant the maximum is twenty-five years in jail and \$15,000 fine.

With respect to the defendant Best, the same disposition. The Court wants him examined under that particular section already read into the record, but because the law demands it I must at this time impose the maximum sentence, and that is twenty-five years in jail plus \$15,000 fine.

I would like to have the record reveal that the Court does not intend to impose the maximum.

When we come to the defendant Simpson, he falls into a different category because of his age. He is the youngest of the three, and the question is can I have him examined, and the answer is yes.

Simpson turned twenty-one on October 3, 1975. He is committed, not sentenced at this time, under 18 U.S.C.

501 (e) to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the Court may grant, the Division of Prisons shall report to the Court its findings.

So you see in Simpson's case I am not sentencing today, I am committing him for study within the provisions of the section to which I have just referred.

MR. VIZCARRONDO: Excuse me, your Honor, perhaps my information is wrong, but the information I have is that Simpson is 27 years old.

probation officer. I might address that. Mr. Simpson at various times in his career has given different dates of birth. I did obtain veri station trhough the New Jersey Department of Vital Statistics that his birth date is October 3, 1954, making him now 21 years of age.

MR. VIZCARRONDO: I am soory. The information I had was age 27.

THE COURT: Check into it further, because if he is pulling one off with regard ... his age that's another proposition. Mr. Concannon, you better find that out because if he is playing with me this is all off and I will send him away.

MR. CONCANNON: He is twenty-one years old, your

THE COURT: I want proof of it, further proof.

Do you get it?

Honor.

MR. CONCANNON: Yes, your Honor.

THE COURT: I am alerted, not you. I am not satisfied. You are satisfied; I am not. Nevertheless, I am going to let it go at this time because there is enough here

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to warrant it, but I want further proof. Do you understand that?

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MR. VIZCARRONDO: Yes, your Honor.

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THE COURT: Do you understand that, Mr. Dean?

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MR. DEAN: Yes, your Honor.

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THE COURT: Upon the coming in of these reports

I shall give them careful study and then the defendants

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will be brought before me for sentence. I indicate to them

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that I can see nothing but a waste of tire if they should

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decide not to fully cooperate with the study. If they don't

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cooperate, and I can't get anything out of this study, then

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I shall proceed to sentence with as much information before

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me as I can possibly gather. I will not have the benefit of

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such a study, and, therefore, I won't be able to give that

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phase of it any consideration at all.

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Then it Dehooves the defendants -- and I wonder whether I shouldn't also say it behooves their attorneys --

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to urge them to interpret to their clients the full sig-

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nificance of what I have undertaken at this time.

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I am quite sure the attorneys would agree with me that there can be no harm in this approach and there might be

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a lot of good that it might yield. If they feel that way I

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think they should impress their own clients that it's up to

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them.

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MR. HERWITZ: May I momentarily address the Court and say, speaking for the defendant Best, if he doesn't understand what your Honor has done I certainly do, and will further interpret it to him. It is not exactly what I suggested in my plea to the Court, but I think it is a better way to handle it, as I would expect from your Honor. I will urge upon him to give full cooperation in this investigation and examination.

Speaking for myself as an attorney, I am very grateful as a member of this bar that there is on this bench a judge like your Honor who has had the years of experience that you have had in these matters and in handling a very difficult situation. Thank you very much, your Honor.

THE COURT: Thank you, Mr. Herwitz.

Gentlemen, thank you very much.

A last word. Do you know what I am told an examination of this kind costs the government? Pretty near between six thousand and seventy-five hundred dollars.

all right.

MR. HERWITZ: Are we required to file an appeal on this, or is that --

THE COURT: You are the professor, you are the guardian angel, you are the lawyer. You have to resolve that yourself.

(Time noted: 1:10 p.m.)

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THE COURT: Would you call the matter and inquire if counsel are ready.

THE CLERK: United States of America versus Stanley Simpson, John Oliver Bryant and Earl Best.

(All counsel indicated they were ready.)

THE COURT: Gentlemen, suffice it to say that I have read and reread the material that has been supplied to me pursuant to the order heretofore made by the court that each of these defendants be studied in Washington, D. C. and that a thorough report be furnished to the court with regard to that study.

Has the government anything to say now that we are about to impose a sentence?

MR. VIZCARRONDO: No, your Honor.

THE COURT: I will be very glad to hear from counsel for the defendant Simpson, Mr. Concannon.

MR. CONCANNON: Thank you, your Honor. I did
not see the presentence report -- I understand your Honor's
policy with respect to that -- nor did I see the results
of study and, for the record, I would like to make a request
to see that at this time.

THE COURT: Counsel, may I assure you that I shall announce whatare the factors on which I predicate my sentence. In other words, the report does not have any

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impact whatever upon me other than the factors that I shall choose to make mention of.

Does that satisfy you?

MR. CONCANNON: I understand.

Your Honor, Mr. Simpson has been in a combination of federal institutions now since April 24 of this year.

West Street for sometime and then in the new Metropolitan

Correctional Center, and for a stretch in Petersburgh,

Virginia, which, as I understand it, is something far less

than can be considered comfortable. While he was in

Petersburgh for the psychiatric study the psychiatrist said

to Mr. Simpson that -- I don't know what he indicated in

his report -- but he did say to Mr. Simpson that he did not

think that he was dangerous or a threat to the community.

Now, I well know why he is here and he does too and I don't mean in any way to diminish the seriousness of the conviction, because the jury found that he was involved to some extent in a bank robbery. I would like your Honor to recall the details of his particular involvement, as the jury evidently found, not for purposes of arguing motions to dismiss, but only to remind your Honor of these essentials.

At the time his co-defendants were in the bank or shortly thereafter he was found some four and a half blocks from the scene of the crime and some two blocks from

his car. I think this is significant, your Honor, because having spent somewhere between 9 and 10 months now in detention facilities, places which by their nature are substantially less comfortable than say an institution where he would have been sent as a sentenced prisoner over that period of time, I think that when you are calculating the punishment and the retribution I don't think it is unfair to consider as spending this amount of time in detention facilities is far more painful than it would have been in other places and, consequently, although ten months may not sound like an awful lot, it's been a great strain on Stanley Simpson.

Your Honor, he faces the parole board in New Jersey sometime after today and that be whether he is sentenced to jail or not. I do not personally think, in spite of the fact I recognize that it is a serious offense, that given the fact that he is not a violent person, and that the psychiatrist in Petersburgh as much as indicated to him that he didn't think that he was a threat, something which he of course did not have to volunteer, I don't think it would be inappropriate to place this young man on probation now for an extended and intensive period of supervision. I have nothing further, your Honor.

THE COURT: Stand up, Simpson.

You heard your lawyer address the court in your behalf. You have a perfect right before the imposition of sentence to say anything that you wish to call to the court's attention. Is there anything you wish to say?

DEFENDANT SIMPSON: No, sir.

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THE COURT: Very well. Will counsel, Mr.

Murphy, speak on behalf of the defendant Bryant, please?

MR. MURPHY: Yes, your Honor.

As I consider this case I am reminded of the story that your Honor told us in chambers during the trial of this case which had to do with a judge of the municipal court, I believe, or General Sessions in New York City and a defendant, who made a remark as to the state of the court's blotter when the time came for sentence, and I remember you telling us that story and it really, I think, applies here because this defendant, my defendant, has I think some remarks towards society said he has been abused by society for a great period of his time and he reacts to it strongly, yes.

I, too, would ask the court to recall the facts of his defense, a defendant who really had attempted a bank robbery where the man did not have the capacity with the weapon and did not hurt anybody, and, in fact, the robbery was terminated before anybody had been threatened or any money had been taken. I ask this court to, please, will you consider the mercy of the court in imposing sentence and the role of this man in society and your Honor's own past, as you told us many times, where you, much more than I, were familiar with the kind of upbringing that would make somebody

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act in that way take that into consideration and remember that this man in fact stopped short of threatening somebody and hurting somebody or taking any money. Thank you very much, your Honor.

THE COURT: Will you stand up, please, Mr. Bryant?

Is there anything you wish to say to the court

before sentence is imposed?

DEFENDANT BRYANT: No, sir.

THE COURT: Very well now, we'll be glad to hear from Mr. Herwitz.

MR. HERWITZ: Your Honor, I know that you have received a full psychiatric report concerning Mr. Earl Best.

I'm sure that the facts of this case are still fresh in your mind.

We have here a young man who for reasons, not being a psychiatrist, we are unable to explain, has been in difficulty on many occasions. As I said, however, last time that he was before your Honor for sentence I think there is a spark of hope for him, your Honor. I think there is a very good chance that this man can make a comeback, can make a comeback and be a credit to society.

I rely on your Honor's understand and experience and I'm confident that the sentence that you will impose will take all these factors into consideration.

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THE COURT: Stand up, Best. Is there anything you wish to say to the court before sentence is imposed?

DEFENDANT BEST: No, sir.

THE COURT: All right. Will you all stand up, the defendants? Counsel, you may remain seated.

I want to talk to all of you and I want to talk very plainly. I know that in your hearts and in your minds you are hoping that the judge in some way will be able to come up with an answer to your problem which will result in your walking out of the courtroom. I would be a faker if I did anything like that. I would just be unworthy of my post as a judge.

You are young people, comparatively speaking, and yet you are men by reason of your actual age. Counsel saw fit, and I welcome the comment, to speak of the judge's own background. It was pretty horrible from an economic standpoint and from almost any angle, but we had a choice either to violate the law, because we were having a miserable time, or do try to rise and amount to something. Not for a moment did I think as a kid that the other fellows in the neighborhood who were breaking the law, not for a moment did I think they were right. I thought that they were terribly wrong. They stole, they did all kinds of things against the law, but even as a boy I knew full well I had

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a choice: Did I want to do the same thing or did I want to go straight? And I decided to go straight. And so did an enormous number of others decide to go straight. We had the same difficulties. We had the same problems.

Way back in the early history of man you just didn't take the other fellow's corn that he managed by labor to accumulate. You just didn't take it because you were hungry and your kids were hungry. In those days they choosed your hands off for doing it.

So let's understand each other: What you did and what the jury found you did is dead wrong and I'm bound by the jury's verdict. What will I do with you? Who are you? What do you really amount to?

If I told Simpson that the psychiatrist says that he is a threat to the community he would stand on his head and he'd say "Judge, he told me that I was no threat to the community," and yet I have got his written statement that you are a threat to the community. You've got a low IQ, fellow. You are a fairly ignorant man. You either face it or you don't. You haven't got a real brain because you didn't use your brain. Don't let anybody kid you. Look at yourself in the mirror and say: What really have I done with myself since I was born? There is no work record. I've been in and out of jail from the time I was a kid,

serious charges against me.

Actually for Simpson three armed robbery arrests as an adult. What should I do with that? Just make believe it didn't happen? It is there, and I think it is unfortunate that you have come to the point where you stand before a judge at your age, having been convicted of a felony, and in connection with which I can send you away, if I choose to put you in jail, for 20 years. What should the doctor do, kid himself after he has taken your blood and tested your heart and your blood pressure? Should he fake you and tell you that your blood is good, when it is no good, and your blood pressure is low instead of being high, because you would like to hear it? I don't believe in that. I believe in leveling with people and I always have, whether they liked it or not, and I'm telling it to you as it is. Why? Because I'm terribly upset. It has come to me that I have to sentence a man at your age. I think of other fellows who haven't got your body, who haven't got your strength, who are hunchbacks, legs off, diseased and have got jobs and who have worked at those jobs steadily with a sense of respect, bringing a few bucks home to momma.

I look at this other fellow here, Best. He has got a gal that says that she loves him. That could be.

But what has he done to become worthy of that lo'e? Now that

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SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

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24 25 he is before me for sentence he wants me to believe him that even though he has had a terribe criminal record that I should wipe it all off because a girl loves him. I shouldn't say to him "go prove yourself, be worthy of her love. Go show that you are a real man and not a punk." That he doesn't want to hear. He wants the judge to let him walk out of here and continue to be in this girl's favor. That is stupid and I won't do it. What, take a girl who may be innocent, marry her and have kids with your brain and your lack of work so that you can produce children who will be a drain on the community because you are unworthy of them and don't give a hoot? That is the problem with the judge.

You are capable of being a man, of rising to the dignity of manhood, each one of you, if you really wanted to, if you cared.

You get what I'm saying, Simpson?

DEFENDANT SIMPSON: Yes, sir.

THE COURT: Does it make sense?

DEFENDANT SIMPSON: Yes, sir.

THE COURT: Are you getting what I'm talking about, Bryant?

DEFENDANT BRYANT: I hear you, your Honor.

THE COURT: But you don't agree?

DEFENDANT BRYANT: Not quite.

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case, you mean?

THE COURT: Why don't you agree with?

DEFENDANT BRYANT: I beg your pardon?

THE COURT: Why? Why don't you agree with?

DEFENDANT BRYANT: I choose not to go into any discourse with dialogue. I'm submitting to you.

THE COURT: What about you, does it sound like sense to you?

DEFENDANT BEST: As far as me being a better man and taking care of children, that responsibility, your Hohor, I believe that I'm capable of.

THE COURT: What do you base that on -- on your prior criminal record, on your work record? What do you base that thought on? What do you want to point to to show that what you say is so? What backs you up? What have you done to convince me that that is so?

DEFENDANT BEST: My efforts in trying to change.

THE COURT: What efforts and since when?

DEFENDANT BEST: Since I've been out, your Honor.

THE COURT: Since you have been convicted in this

DEFENDANT BEST: Yes.

THE COURT: I see.

I have here before me three people. How old are you, Simpson?

DEFENDANT SIMPSON: 21.

THE COURT: I wanted to be exact.

Best, you are 27, isn't that so?

DEFENDANT BEST: 28.

THE COURT: And Bryant, you are 25?

DEFENDANT BRYANT: Yes, sir.

THE COURT: Each one has a frightening criminal record that antedated the instant offense. Each one is a perfect example of the old addage that birds of a feather stick together. They found a mutuality in their low, contemptable estimate of live and how to meet or cope with the challenges of life. Each sought a criminal course of conduct and made that almost a daily pursuit.

And so we have three defendants saturated with criminal instinct and they have demonstrated it and brought it to what they think it fruition over the many years since boyhood.

Each defendant upon examination has been found to have a comparatively low IQ. A thorough medical examination finds that each one is physically fit and yet that physical fitness has been laid to waste because there is no record of work that is worthy of more than a glance.

I must say that in the years that I have sentenced people this is one of the most desperate looking situations

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that confronts the sentencing judge. The easiest thing is to plucka figure and announce it and send each one off to jail for a prolonged period of time. That is the easy course without lecture and without commentary, just announce a figure and tell the marshall to take them away.

What potential they have is minimal, but on the basis of what I have perceived over the years I must say that there have been, and frequently, instances where people from the gutter have risen and have gone on top. To say that that is not possible is to belie what these eyes have seen and these ears have heard.

Is any one of these three capable of rising?

I have said that they are anti-social and that they have not been won over yet to a course of conduct that differs from what they have set up as their hallmark over the years. The fact that a statement by Best has been made that since his arrest in his case he thinks he is a better man may be true, but who do I get the statement from? I get it from aman convicted of bank robbery before me. I get it from a man who has a dreadful prior record as a young adult and as a young man. What value can I attach to his statement?

Does he know what he is talking about? Haven't I a right to say: Go prove it, show me. I just don't want it out of your mouth. I want action. I want something to show me, convince

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me, that what you say is so.

Right now every one of you is not only financially bankrupt but morally bankrupt. The potential that you offer is also within the orbit of the bankruptcy. What do I do? Well, this may come as a surprise and I doubt whether you will ever believe it, but I will say that I have walked the floor with this case so deep is my concern that what I do should not only be for the best as to each defendant but for the community who also has a right to be heard, who also ' has a perfect right to say that they don't want this kind of person in their midst while they are attempting to bring up their children. They too have their problems, limited economic situations, frightening day by day instances of misbehavior on the streets, sexual abuse, dreadful behavior of human beings that are upsetting families and frightening them to death, and they have a right to be heard, and they don't want the Simpsons and the Bests and the Bryants to mingle until they are clean.

I therefore have decided not to send you to a jail type of institution for a given number of years, whether it is five, ten, 15 or 20. I have decided to put you in a place where you will be taught something as to how to use your God given skills or, rather, convert whatever power you have got into skills, where you can learn a trade, where you

may fashion your future.

that can happen.

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I want to see whether they can do something with you, and if they can, to let you out as soon as they are satisfied that you have amounted to something and that you will go forward and be something in life worthwhile. And

can learn values that you may adopt as your own, and that

If they wish to, in a month, in six months, in a year, two years, whenever, under the authority vested in them, they can release yr. You prove yourself and I don't care if they let you out in three months, which, of course, is impractical. You are not going to be able to absorb the lessons in three months. But if it were possible it would be all right with me if they let you out in a matter of months, provided, of course, that you deserve it and have made your mark.

If you don't, I want them to keep you in there, not beyond 12 years, and since the challenges offered by each one of these defendants is almost identical because of the background and because of the mental status and because of all of the factors that a judge considers at the time of sentence, because they are almost twins so to speak, in those factors, the sentence will be the same as to each because the objective of the court is that they be taught that they

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them 10 years in a jail, the chances of parole would be mighty slim because of their prior record and they might have to serve the greater part of that sentence.

Accordingly, it is the judgment of this court that each defendant is committed for a period of 12 years

learn and that upon learning and achievement that should be

recognized and they should not be confined, whereas if I give

that each defendant is committed for a period of 12 years pursuant to 18 United States Code Section 4208 (a) (2) so that he may become eligible for parole at such time as the Board of Parole may determine.

Nothing would please me more than to learn that any one of these defendants, to say nothing — that each one of them has seen what this sentence has meant to the judge in imposing it, and that each one has at least the intellect to recognize that I could have thrown a number at you and have had each one of you taken away to a regular jail. Instead I have given you a sentence whereby your own accomplishment you may be fixing the time of your confinement.

I repeat, if you do well by what I have offered you, rather, tried by the sentence to effectuate I would be pleased to learn that you have accomplished it and are out in a very short time.

On the other hand, if you do not make good and take advantage of what I have offered, the law is that you

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be kept away or taken away from the community until you have amended your ways and aspects and notions with regards to life and values so that you will not be a burden on the community and continue your anti-social patterns.

MR. VIZCARRONDO: The defendants are accused of a conspiracy which is a five-year maximum sentence.

of counts. I won't specify. The sentence is to run concurrently on any other charge or sentence anywhere, in New Jersey or any other court. This is absolutely independent of all of that and stands on its own footing.

MR. VIZCARRONDO: So the five years on that count will run concurrently to the 2113a court?

THE COURT: Precisely.

MR. VIZCARRONDO: In addition, the defendant Simpson is under 22 years of age. I would ask your Honor to state whether or not he has considered youthful offender treatment?

THE COURT: I have and my discretion is that he is unworthy of that kind of boon to which you refer, yes, sir, and I so state.

MR. MURPHY: I have been asked by the defendant

Bryant to ask the court if he could serve the time in

Lewisburgh, where he is right now, and he is already in

school. If the court could put that on the record, for what-

ever good it might do, it would be appreciated. I think it is within discretion.

of Prisons. I shall make a note and I shall on my own inquire as to whether or not he can be kept in Lewisburgh as a part of the program encompassed by this sentence.

MR. MURPHY: The defendant Bryant is also under the age of 26.

than what I have already described or made mention of in connection with the sentence are denied and all other benefits under the Youth Corrections Act and under the Youthful Offender Act in toto, any aspect of it, because of the reasons I have already related.

Mr. Herwitz, did something occur to you?

MR. HERWITZ: No, I just want express on my
behalf and in behalf of my client that -- I don't say appreciation, but express my understanding of the court's
continuing understanding of these problems and the court's
consideration.

THE COURT: Mr. Herwitz, nothing would be tougher for me than to realize that all of this was wasted and I have a hope that they are going to prove to me that they can make good as much as the thousands of people that I have seen in

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I have seen it. It is up to them, and the best that the lawyers can do for their clients, if they can see the wisdom of it, is to join the court in that hope and to say so to me and to their clients: This is it. We might as well face up to it. Tell them what the alternatives were to the judge and chat he cast them aside and came to this one. Talk to them in a way that will show them that you too share the hope that they can straighten themselves out.

MR. CONCANNON: I think under the law each of the defendants must now be advised of his right to appeal.

THE COURT: Yes, that is right.

MR. CONCANNON: Mr. Simpson makes the specific request that your Honor recommend to the prison -- that your Honor make the same recommendation that he be sent to Lewisburgh Penitentiary.

THE COURT: I shall take it up. I doubt very much whether I can direct it. I can tell them that I'm interested in it and ask them to help me carry out the sentence in the spirit that prompted the imposition of the sentence. That I promise you on the record I shall do with regard to Simpson and with regard to Bryant.

Stand up again, Defendants. Under the law it is my duty to tell you that you have an absolute right to take

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an appeal from the verdict in this case and from the sentence that was just imposed by the judge and that that notice of appeal must be filed within 10 days from today. The failure to file an appeal within that time is regarded in law as an abandonment of the appeal and so I am going to make sure that those of you who wish to appeal, and I assume each one of you do, that no later than tomorrow or no later than the close of this week a notice of appeal should be filed in your behalf.

I want you to understand further that if you haven't the means to retain counsel that the court will assign counsel to you to represent each of you separately on appeal before the Appellate Court, and that each of you has a perfect right to be represented on appeal and that the present actorneys who stood by your side and fought for you throughout the trial must go on with respect to any appeal unless they are allowed to step aside by order of the Circuit Court of Appeals.

In other words, I haven't the power to tell them to step aside and I wouldn't if I did have the power, but the power to ask them to step aside is not with me. They must go on until other counsel are appointed by the Circuit Court of Appeals.

MR. CONCANNON: Mr. Simpson, if I may, has already

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asked me to file a notice of appeal in his behalf, and the federal defendants service would continue that unless otherwise relieved.

THE COURT: Sir, you go forward.

MR.CONCANNON: I have a notice of appeal which is also a transcript order form, which does not normally contain a blank giving the defendant permission to appeal informa pauperis, but there is a blank indicating that and indicating permission to appeal informa pauperis.

THE COURT: That will be taken care of.

Is there anything else, Mr. Murphy, occurring to

MR. MURPHY: No, sir.

THF COURT: Mr. Herwitz?

MR. HERWITZ: No, sir.

THE COURT: Mr. Simpson, did you understand what

I said with regard to rights under appeal?

DEFENDANT SIMPSON: Yes.

THE COURT: Did you understand, Mr. Bryant?

DEFENDANT BRYANT: Yes, sir.

THE COURT: Did you understand, Mr. Best?

DEFENDANT BEST: Yes, sir.

## CERTIFICATE OF SERVICE

I certify that a copy of this brief and appendix has been mailed to each of the following persons:

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